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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

RODNEY ROW,

Petitioner,

v.

LEIGH ROW (DEESE),
THE STATE OF NORTH CAROLINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

GEORGE B. MAST
Counsel of Record
BRADLEY N. SCHULZ
RON L. TRIMYER, JR.
MAST, SCHULZ, MAST,
JOHNSON, & WELLS, P.A.
One Courthouse Square
P.O. Box 119
Smithfield, NC 27577
(919) 934-6187

Counsel for Petitioner

216115

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

WHETHER THE NORTH CAROLINA COURT OF APPEALS' DECISION ON THE CONSTITUTIONALITY OF THE NORTH CAROLINA CHILD SUPPORT GUIDELINES IS DIRECTLY CONTRARY TO THIS COURT'S AND OTHER APPELLATE COURTS' PRECEDENT REGARDING THE BURDEN SHIFTING OF PROOF AS TO THE CONSTITUTIONALITY OF A STATUTE, THE SUPREMACY CLAUSE, THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

PARTIES TO THE PROCEEDINGS

Petitioner Rodney Row, a plaintiff-appellant in the state proceedings below, is referred to herein as "petitioner." Respondent Leigh Row (Deese) is the defendant in the state proceedings below and is referred herein as "respondent Deese." While not a party to the state proceedings, the respondent State of North Carolina participated pursuant to N.C. Gen. Stat. § 114-2(8)(a) which requires the State Attorney General to intervene and participate when the State is an interested party. Respondent the State of North Carolina is referred to herein as "respondent North Carolina."

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Petitioner prays that a Writ of *Certiorari* issue to review the decision of the North Carolina Court of Appeals' decision published at 650 S.E.2d 1 (2007).

CITATION TO OPINIONS BELOW

The Opinion of the North Carolina Court of Appeals is annexed hereto and reported at ___ N.C. App. ___, 650 S.E.2d 1. (Pet. App. A 1a-17a). Petitioner filed a Petition for Discretionary Review to the North Carolina Supreme Court on September 25, 2007 the court denied the petition on March 6, 2008, as reported at 362 N.C. 238, 659 S.E.2d 741, and is annexed hereto. (Pet. App. F 100a-101a).

JURISDICTION

The North Carolina Supreme Court denied discretionary review of the Opinion of the North Carolina Court of Appeals with respect to the issues to be addressed in this petition on March 6, 2008. This petition is timely filed within ninety days of entry of judgment of the North Carolina Supreme Court. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND FEDERAL REGULATION PROVISIONS INVOLVED

The Appendix to this Petition reproduces the relevant portions of Article VI and the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § § 654 and 667, 45 C.F.R. § 302.56, N.C. Gen. Stat. § 50-13.4, and N.C. Gen. Stat. § 114-2(8)(a). (Pet. App. G 102a-).

STATEMENT OF THE CASE

This case arises out of petitioner's assertion that the application of the North Carolina Child Support Guidelines violated his federal constitutional rights. Petitioner Row and respondent Deese were married and had two children together. The parties later divorced and were awarded joint custody of the children, with the respondent Deese having primary custody. In 2001, respondent Deese was also awarded child support in the amount of $700.00 per month. Thereafter, petitioner, who is a Major in the United States Army, was transferred to Hawaii. Several unrelated motions in the domestic case were filed by both parties, with respect to custody and support.

On February 2, 2004, petitioner filed a motion to modify child support and to determine the legality of said guidelines. The constitutional challenges were not addressed by the trial court in an order entered December 6, 2004 setting petitioner's child support obligation at $1,331.80 per month. Subsequently, on July 26, 2005, petitioner filed a supplemental motion to modify child support and deviate from the North Carolina Child Support Guidelines, and to determine the legality of said guidelines.

In November 2005, a hearing was held with respect to the motions, and the North Carolina Attorney General appeared. On May 30, 2006, the court entered an order denying petitioner's motion to modify as there was not a "substantial change in circumstances", therefore leaving petitioner's monthly obligation at $1,331.80 per month. The court also held that the guidelines were

constitutional Petitioner put forth expert testimony and evidence which established a *prima facie* case that the respondent North Carolina had failed to comply with federal statutory and constitutional law. Neither respondent Deese nor the respondent North Carolina put forth any evidence on the issue of the constitutionality of the guidelines.

Title IV-D of the Social Security Act governs the federal-state program regarding child support enforcement. 42 U.S.C. § 651, *et seq.* This Act gives conditional grants to states that develop child support systems which facilitate the establishment of support orders and collections, including the creation of child support guidelines. *Id.* 42 U.S.C. § 667 says that states "must" establish guidelines as a condition to having their plan approved so as to receive funding from the federal government. This section also commands that states "shall" review the guidelines at least once every four years to ensure that their application results in appropriate amounts of child support. *Id.*

Section 667 goes further to provide that there "shall" be a rebuttable presumption in any judicial or administrative proceeding regarding child support that the amount of the award resulting from the application of the guidelines is the correct amount. *Id.* Evidence that the application of the guidelines would be unjust or inappropriate under the criteria set forth by the State is sufficient to rebut the presumption. *Id.*

The Secretary of Health and Human Services' regulations, beginning at 45 C.F.R. § 301, *et seq.*, created Section 302.56 to implement aspects of the establishment of child support guidelines. Section

302.56(c) states that a State's guidelines must at a minimum: 1) take into consideration all earnings and income of the non-custodial parent; 2) be based on specific descriptive and numeric criteria and result in a computation of support obligation; and 3) provide for the child's health care needs, through health insurance or other means. *Id.*

Section 302.56 (e) states that the State "*must* review, and revise, if appropriate, the guidelines . . . at least once every four years to ensure that their application results in the determination of appropriate child support award amounts. *Id.* (*emphasis supplied*). Section 302.56(h) goes further to provide that, "[a]s part of the review of a State's guidelines *required* under paragraph (e) of this section, a State *must* consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, *the guidelines.* (*emphasis supplied*) The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited. The statutory construction of the regulation mandates the following of all provisions by the states, not merely subsection (c).

Tracking part of this language, North Carolina enacted N.C. Gen. Stat. § 50-13.4, which requires the Conference of Chief District Court Judges of North Carolina to create the guidelines and at least every four years, to review the guidelines to determine whether their application results in appropriate child support award amounts. However, the guidance ends there. North Carolina has not set forth what procedures are

required to be followed when performing this quadrennial review. Pursuant to the Freedom of Information Act (5 U.S.C. § 552), petitioner's expert made a request to the Conference for information and documents relating to its creation and review of the guidelines. In a letter that was introduced into evidence, the Chair of the Conference, Judge Keever responded, "I do not have any of the information that you are seeking." At trial, the petitioner's expert testified that no review has been done at all by North Carolina since 1993. There is no evidence that North Carolina has followed the instructions of the Secretary of Health and Human Services regarding the analysis of its guidelines.

Also introduced into evidence was correspondence from Policy Studies, Inc., a Colorado corporation which provided the guidelines to North Carolina that confirmed that its last study for North Carolina was in 1993. Additionally, the correspondence confirmed through petitioner's expert that it had merely "updated" the cost tables using national data and updating tax rates. There is no evidence that North Carolina has ever conducted a study on its guidelines as required by 45 C.F.R. § 302.56. A proper review would include an analysis of data on the cost of raising children, gathered through sampling or other methods, on the application of, and deviations from North Carolina guidelines as set forth in § 302.56. There are no "Federal Child Support Guidelines", and thus a proper analysis would focus on the cost of raising children in North Carolina.

The unrefuted evidence at the hearing established that both the petitioner and the respondent Deese had similar incomes, that petitioner had custody of his

children for approximately 100 nights out of the year and that their children's reasonable needs were approximately $3,000.00 per month. This amount took into consideration the children's expenses at both residences, including food, housing, and their private school education at both residences. Of this $3,000.00, petitioner incurs directly approximately $1,100 per month for costs related to his children, and he has also been ordered to pay respondent Deese approximately $1,300.00 per month. Of the children's $3,000.00 monthly expenses, petitioner is obligated to pay approximately $2,400, which is eighty percent (80%) of the children's costs, despite both parents having similar income and the petitioner having custody approximately twenty-five (25%) of the year.

Also relevant to this Petition, the expert testimony and evidence demonstrated that the North Carolina Child Support Guidelines uses an "income shares model" to create the figures. An important element behind this model is that it estimates expenses for children based upon adult consumption levels of "alcohol, tobacco, and adult clothing" rather than studying actual expenses for children. Further, the inherently false assumptions of this model include: 1) there is only one house for both of the parties to maintain; 2) that the primary custodial parent cares for the child(ren) 100% of the time; 3) that the non-custodial/secondary custodial parent incurs no costs in raising the child(ren); 4) that there is phantom income to maintain the same standard of living that parents would have sustained if living together; and 5) that child related tax incentives should not be factored into the guidelines. The expert testimony revealed that in petitioner's case, all of the assumptions were false, and this evidence went unrefuted by the respondent North Carolina.

Additionally, the North Carolina Child Support Guidelines has a "Schedule B" worksheet which is utilized only if the secondary custodial parent has the child(ren) for 123 nights during the year. When using "Schedule B", the standard monthly obligation of child support is automatically increased by fifty percent (50%). The unrefuted evidence at the trial below, demonstrated that this 123 night threshold was arbitrary and it created an irrebuttable presumption that the secondary custodial parent incurs no costs until this arbitrary threshold is met. Further, it was also demonstrated that the child's necessary expenses did not automatically increases by fifty-percent once the threshold was met. The actual effect of the automatic increase was to smooth the cliff effect which would lower the primary custodial parent's monthly check if the expenses for the child were shared on a *pro-rata* basis. This evidence went unrefuted by the respondent North Carolina. The trial court nevertheless determined the guidelines to be constitutional, and the North Carolina Court of Appeals affirmed this decision of the trial court.

REASONS FOR GRANTING THE PETITION

The North Carolina Supreme Court's decision to deny review of the North Carolina Court of Appeals' decision affirmed the determination that respondent North Carolina's application and review of the state's child support guidelines complies with federal law. The Court of Appeals affirmed the lower trial court's decision that respondent North Carolina's child support guidelines comply with federal statutory and constitutional law. However, this decision was made after petitioner demonstrated a *prima facie* case of

unconstitutionality based upon the defects of the guidelines, and without the production of any evidence from either respondent that the guidelines are in constitutional compliance.

I. THE NORTH CAROLINA COURT OF APPEALS' DECISION ON THE CONSTITUTIONALITY OF THE NORTH CAROLINA CHILD SUPPORT GUIDELINES IS DIRECTLY CONTRARY TO THIS COURT'S AND OTHER APPELLATE COURTS' PRECEDENT REGARDING THE BURDEN SHIFTING OF PROOF AS TO THE CONSTITUTIONALITY OF A STATUTE, THE SUPREMACY CLAUSE, THE DUE PROCESS CLAUSE AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

A. BURDEN SHIFTING

This Court has consistently held that the burden shifts to the opposing party to produce evidence to rebut a *prima facie* case of unconstitutionality. *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 363 (1977); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986); *Hartman v. Moore*, 547 U.S. 250, 260 (2006). Through numerous cases, the North Carolina Supreme Court has also held that once a *prima facie* case of unconstitutionality is presented, the burden shifts to the opposing party to refute the unconstitutionality. *North Carolina v. Floyd*, 343 N.C. 101, 468 S.E.2d 46 (1996), *cert. denied*, 519 U.S. 896 (1996); *North Carolina Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983).

While burden shifting cases primarily arise in racial discrimination cases, many state courts have applied this burden shifting principle in termination of parental right cases and in challenging local ordinances on constitutional grounds. *See e.g. In re the Termination of Parental Rights to Max G.W.*, 293 Wis.2d 530, 547, 716 N.W.2d 845, 854 (Wis. 2006); *Lambros, Inc. v. Town of Ocean Ridge, FL, et al.*, 392 So.2d 993 (1981).

In *In re the Termination of Parental Rights to Max G.W.*, the mother of Max G.W. contested the constitutionality of her no contest plea. *In re Max*, 293 Wis.2d at 543, 716 N.W.2d at 852. In determining the constitutionality of her plea, the Wisconsin Supreme Court applied the burden shifting principle stating that once a party makes a *prima facie* showing that the circuit court violated its mandatory duties of informing the party of her rights, the burden shifts to the county to establish by clear and convincing evidence that the parent "knowingly, voluntarily and intelligently waived the right to contest the allegations in the petition." *Id.* at 854, *citing In re Brittany Ann H. v. Steven H.*, 233 Wis.2d 344, 363, 607 N.W.2d 607, 617 (Wis. 2000).

In *Lambros*, the appellant corporation challenged a zoning ordinance of the town on constitutional grounds. *Lambros* at 993. The issue was whether once the ordinance was under attack, whether at that time the burden of proof shifts to the municipality to show that the ordinance was constitutional, or whether the burden remains with the attacker. *Id.* at 994. The appellate court held that the burden did not shift to the municipality until the attacker made out a *prima facie* case of unconstitutionality. *Id.*

North Carolina has failed to follow the commands of 45 C.F.R. § 302.56. Here, petitioner made a *prima facie* case at trial showing that the creation and application of North Carolina's Child Support Guidelines failed to comply with federal law and were unconstitutional. Petitioner clearly established that North Carolina's guidelines are not being reviewed every four years and do not meet the minimum requirements established in 45 C.F.R. § 302.56. *Id.* This evidence was not refuted by respondents at trial, and therefore, North Carolina's Child Support Guidelines should have been declared unconstitutional. However, the North Carolina Court of Appeals upheld the trial court's determination that the guidelines are valid and appropriately applied to petitioner and failed to address or discuss the burden shifting issue at all. *Row*, __ N.C. App. __, 650 S.E.2d 1 (2007), *rev. denied*, 362 N.C. 238, 659 S.E.2d 741 (2008). By holding so, the North Carolina Supreme Court violated the longstanding principle of burden shifting once a *prima facie* case of unconstitutionality is established.

This case provides the Court an ideal opportunity to address the burden shifting principle because the Petitioner has made out a *prima facie* case of unconstitutionality which was unrefuted by Respondent. It is imperative that the state and federal courts abide by this longstanding principle, and it is clear here that the courts in North Carolina have failed to do so. Petitioner respectfully requests this Court to uphold the principle of burden shifting and declare North Carolina's Child Support Guidelines unconstitutional as no evidence was presented to refute the *prima facie* case of unconstitutionality.

B. SUPREMACY CLAUSE

It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985), *citing Gibbons v. Ogden*, 22 U.S. 1 (1824) (Marshall, C. J.). This Court has repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes. *See Hillsborough*, 471 U.S. at 713, *citing Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141, 153-54 (1982); *United States v. Shimer*, 367 U.S. 374, 381-83 (1961).

Federal law may supersede state law in several ways. To discern Congress' intent, the Court should examine the explicit statutory language and the structure and purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). One way for Congress to pre-empt State law is by so stating in "express terms." *Hillsborough*, 471 U.S. at 713, *citing Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In *Hillsborough*, this Court found that an ordinance was not pre-empted where there was no express pre-emption by Congress and an expressed statement by the FDA that the local laws were not intended to be pre-empted by federal law. *Id.* at 714-16.

"In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make

reasonable the inference that Congress left no room for supplementary state regulation." *Hillsborough*, 471 U.S. at 713, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law, *Hillsborough*, 471 U.S. at 713, *citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough*, 471 U.S. at 713, *citing Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In analyzing North Carolina's laws relating to its child support guidelines, this Court should not only review the language used by North Carolina, but also the implementation and actual effects of the law. "In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). This Court has stated, "[w]e can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Gade*, 505 U.S. 88, 105-106, *citing Perez v. Campbell*, 402 U.S. at 651-52 (1971).

With respect to the states' child support guidelines, this Court, as well as other state courts have had relatively few opportunities to address the related issues that arise in their implementation. In *Rose v. Rose*

et al., 481 U.S. 619, 623 (1987), this Court held that a veteran's disability benefits under Title 38 did not preempt a Tennessee garnishment provision in its child support enforcement act. *Id.* at 636.

A similar preemption issue was addressed by the Eighth Circuit in *Jackson v. Rapps*, 947 F.2d 332 (8th Cir. 1991). In *Jackson*, at issue was whether the policy and practice of the Missouri Division of Child Support was preempted by federal law and regulations. *Id.* at 333. Missouri, by participating in the joint state-federal Aids to Families of Dependent Children (AFDC) program, was required to comply with the federal law and regulations concerning the program, as well as implement a child support enforcement program in "substantial compliance" with Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-665. *Id.* at 333.

To become eligible for AFDC benefits, the applicant must assign "support rights" to the state which became an "obligation owed to the state." *Id.* at 333-34, *see also* 42 U.S.C. §§ 602(a)(26)(A), 656. The amount of the obligation could be set by the state in accordance with a formula approved by the Secretary as set forth in 45 C.F.R. § 302.53(a). *Id.*; *see also* 42 U.S.C. § 656(a)(2). Missouri's policy was to designate the full amount paid out, rather than utilizing the formula established by the federal regulations. *Id.* at 334.

The Eighth Circuit stated "the question here relates to the conditions that Congress has placed on state programs supported by federal funds. The State voluntarily accepts the conditions imposed by Congress and, once it chooses to do so, the supremacy clause

obliges it to comply with federal AFDC requirements." *Jackson*, 947 F.2d 36, *quoting Gorrie v. Bowen*, 809 F.2d 508, 520 (8th Cir. 1987). The court found the language of 42 U.S.C. § 654(13) to be mandatory. *Id.* at 337. That Section provides: "the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for . . . obtaining support orders, and collecting support payments." *Id.* The circuit court affirmed the lower district court's ruling that the Supremacy Clause pre-empted the state's statute, as well as its policy and practice. *Id.*

Similarly, in *Gilbert v. Gilbert*, a father challenged the State of Washington's statute which required a statutory minimum child support obligation of $25.00 per child per month on the basis of federal pre-emption under the Supremacy clause. *Gilbert*, 88 Wn. App. 362, 945 P.2d 238 (Wash. App. 1997). Washington's child support statute did not permit that the amount be rebutted by the obligor parent as required by 42 U.S.C. § 667. *Id.* at 365, 369, 945 P.2d at 239, 241. The appellate court acknowledged that although matters relating to domestic relations were generally left to the States, "when federal funding is at issue, state rules and regulations that are inconsistent with federal standards risk invalidity under the Supremacy Clause . . ." *Id.* at 370-71, 945 P.2d at 242. The appellate court held that the requirements of the federal statutes and regulations were mandatory, and under the Supremacy Clause pre-empted the state statute. *Id.* at 371, 945 P.2d at 242.

An analogous issue was also address by the Minnesota Court of Appeals in *In re Doll v. Barnell, et al.*, __ Minn. App. __, 693 N.W.2d 455 (2005). In *Doll*, the appellants argued, *inter alia*, that the Minnesota Child Support guidelines violated the Supremacy Clause. *Id.* at __ Minn. App. __, 693 N.W.2d at 464. Unlike the courts in *Jackson* and *Gilbert*, the Minnesota Court found no express pre-emption and no intent to occupy the field of child support guidelines, and consequently only reviewed for actual conflict with federal law. *Id.*

The appellants in *Doll* attempted to show that the state failed to comply with 45 C.F.R. § 302.56(h). However, the appellate court's review of the record supported the state's position that the guidelines complied with federal requirements. *Id.* The State's evidence included, but was certainly not limited to, the "Minnesota Department of Human Services' 2002 Quadrennial Review of the Minnesota Child Support Guidelines", which expressly considered "economic data on the cost of raising children and an analysis of case data relating to the application of the guideline." *Id.* The court also found it important that the State had received federal approval, an issue not addressed by the *Jackson* and *Gilbert* courts. *Id.* The Court went onto hold that there was no Supremacy Clause violation, and further stated that even if Minnesota had not reviewed its guidelines as required, the "state would simply be ineligible for incentive payments." *Id.* at __ Minn. App. __, 693 N.W.2d at 465.

Similarly, in *Ward v. McFall*, the Supreme Court of Georgia reversed a decision declaring the Georgia child support guidelines unconstitutional under the Supremacy Clause. *Ward*, 277 Ga. 649, 593 S.E.2d 340 (2004), *cert. denied*, 543 U.S. 818 (2004). Like the Court in *Doll*, the Georgia Supreme Court stated "[i]f Georgia has not reviewed its guidelines in the exact manner stated in 45 C.F.R. § 302.56(h), it does not 'do major damage' to that federal interest", and found that the Secretary had approved the state's guidelines. *Id.* at 342-43, 593 S.E.2d at 652-53.

Here, petitioner Row contends that the language of the federal statutes and regulations creates express preemption by Congress regarding North Carolina's implementation and review of the child support guidelines. The aspects petitioner contends are in conflict are specifically the rebutability of the guidelines, as well as the review procedure. In the alternative, petitioner contends that preemption may be implied by the conflict created by the North Carolina guidelines in that the guidelines are not actually rebuttable and have not actually been reviewed as required by federal law.

The guidelines themselves establish that the methodology used by the Denver corporation, Policy Studies, Inc. which prepared the guidelines, uses the income shares model. The guidelines and the worksheets that North Carolina utilizes do not allow the foundation of the model to be rebutted. Further, the arbitrary 123 night threshold and automatic increase in the child(ren)'s needs by meeting the threshold, cannot be rebutted either.

With respect to the review process under § 667 and § 302.56, as expressed by the appellate courts in *Jackson* and *Gilbert*, the statutes and regulations are mandatory and must be followed by the states. The language of N.C. Gen. Stat. § 50-13.4 expressly conflicts with § 667 and § 302.56 as the North Carolina statute does not provide for the same analysis required by § 302.56. Alternatively, the evidence is uncontroverted that the Conference of Chief District Court Judges of North Carolina have never performed the review as required by the statutes and regulations.

The North Carolina Court of Appeals below in *Row* opined that, "[b]ecause Congress has not positively required by direct enactment that state law be pre-empted in the area of child support enforcement, we hold that federal law does not pre-empt certain portions of the North Carolina Child Support Guidelines." *Row*, __ N.C. App. __, __, 650 S.E.2d 1, 3 (2007). The court further stated that the North Carolina guidelines met the minimum requirements of 45 C.F.R. § 302.56(c), and that the guidelines that Policy Studies produced for North Carolina constituted a review of guidelines complying with § 302.56(h). *Row*, 650 S.E.2d at 5.

However, there was no evidence at trial to suggest that either "North Carolina's Guidelines" or the "cost of raising children North Carolina" had ever been studied and analyzed in compliance with federal law. The only evidence was that Policy Studies has used "national data." The *Row* court also noted that North Carolina's guidelines had been approved by the Secretary of Health and Human Services and that North Carolina had not been penalized with a decrease in funding. *Id.*

Approval of the guidelines by a state agency is not a guarantee that a state law fulfills the requirements of a federal law. Moreover, the fact that North Carolina has not been penalized with a decrease in funding could be based upon a number of reasons, exclusive of North Carolina's compliance with the federal law. Therefore, this fact should not be determinative of whether or not a state's guidelines are in compliance with federal law, as a lack of disapproval is not the same as compliance.

Under Rule 10 of the Rules of the Supreme Court of the United States, this Court should take into consideration the inconsistent decisions of the appellate courts discussed above as they involve important federal questions. Sup. Ct. R. 10. "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (citations omitted).

This Court should review this pre-emption issue as there is an actual conflict in whether or not the federal statutes and regulations are mandatory in regard to the implementation and review of the child support guidelines, as well as the compliance with federal law.

C. SUBSTANTIVE DUE PROCESS

Petitioner contends that his constitutional right to substantive due process has been violated through the application and implementation of the North Carolina child support guidelines in his matter. In order to prove a substantive due process violation, a party must show that he was arbitrarily and capriciously deprived of a constitutionally protected interest. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (recognizing that there must be a deprivation by the government of a constitutionally protected interest before a due process violation occurs); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540-41 (2005). *See City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Washington v. Harper*, 494 U.S. 210 (1990).

This Court has specifically recognized that parents have a liberty interest in raising, educating, and providing for their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). The North Carolina Supreme Court has also stated that protection of the family unit is guaranteed by both the Ninth and Fourteenth Amendments of the U.S. Constitution. *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001). Further, petitioner has a constitutionally protected right to his property protected by the Law of the Land Clause found in Section 19, Article I of the North Carolina State Constitution. Therefore, petitioner has a cognizable liberty interest in the rearing of his children, including financially providing for them, and has a right to his property.

A similar matter was addressed by the Minnesota Court of Appeals in *In re Doll*. *In re Doll*, __ Minn. App. __, 693 N.W.2d 455 (2005). In *Doll*, the appellants argued, *inter alia*, that the state child support guidelines violated their substantive due process rights by requiring an obligation that met more the children's "basic needs." *Id.* at 463. The appellate court found that there was no "fundamental right" to have the support calculated based *solely* on the amount of the time the parent spends with the child or based *solely* on the actual cost of the child. *Id.* at 461 (*emphasis supplied*). The court went onto find no substantive due process violation and stated that the "statute is not rendered unconstitutional simply because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 463, *citing Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The expert testimony and evidence in *Row* below demonstrates that the North Carolina's 2002 Child Support Guidelines are arbitrary and capricious as they substantially overstate child costs due to the foundations having no economic basis. The guidelines estimate child care costs based off of adult consumption levels of "alcohol, tobacco and adult clothing" instead of studying actual expenses for children. 45 C.F.R. § 302.56 states that "a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines." 45 C.F.R. § 302.56(h). Using adult consumption levels of "alcohol, tobacco, and adult clothing" clearly does not determine the cost of raising children as required by § 302.56.

Further, the guidelines are arbitrary and capricious in that the figures have never been reviewed by North Carolina as mandated by federal law. Federal law demands that the states review, and revise, if appropriate, their child support guidelines "at least once every four years to ensure that their application results in the determination of appropriate child support award amounts." 45 C.F.R. § 302.56(e). The evidence demonstrated that North Carolina has not performed a review or study on "its guidelines." Rather, North Carolina has only purchased the updated cost tables from the Denver corporation Policy Studies, who have merely used national data rather than performing an actual study and analysis of North Carolina child related costs. Because North Carolina has not completed an assessment and analysis of the guidelines in over four years, as mandated by federal law, the guidelines are arbitrary and capricious

In complying with 45 C.F.R. § 302.56, petitioner contends that an appropriate study would include a sampling of the population of North Carolina, looking at factors such as the children's expenses of both parents and doing a comparison as to whether the current guidelines exceed or meet the needs of the children. Providing for the needs of children is the goal behind Child Support Guidelines, yet this information has never been analyzed in North Carolina.

In addition, the threshold numbers used to determine whether "Worksheet A" or "Worksheet B" applies are arbitrary and have no economic basis or foundation. As stated earlier, the 123 night threshold and automatic fifty-percent increase in the child(ren)'s

cost are unsupported by any economic basis. The use of this 123 night threshold is arbitrary, according to the expert testimony below, and respondents have provided no evidence showing why 123 nights should be used as the threshold as opposed to 90 nights or 150 nights, and why the costs of the child(ren) increase at all. The State of Arizona implements a parenting time adjustment that begins with 4 overnights which prevents the "cliff effect" that occurs with North Carolina's guidelines.

Furthermore, petitioner contends that the guidelines are arbitrary and capricious because they do not take into account significant tax exemptions and credits, which have been provided for since the inception of the guidelines. *See, e.g.*, 26 U.S.C. §§ 21, 24, 32, 151-52, 213 (2000). The children's tax exemption is not factored into the guidelines nor is the new tax credit for head of household, earned income, and child care factored into the guidelines. Therefore, when the primary custodial parent claims the tax exemption and credits, the secondary custodial parent, or non-custodial parent, gets no credit or deduction even though he or she supposedly shares equally in the financial costs of the children. Here, this application puts a disproportionate share of the child's expenses on petitioner, the non-custodial parent, and as such, the guidelines are arbitrary, capricious and violative of due process.

Additionally, respondents cannot justify the arbitrary and capricious application of North Carolina's Child Support Guidelines because there is no legitimate state interest furthered by the guidelines. A valid state interest existed behind the creation of federal law 45 C.F.R. § 302.56. The law requiring states to update their

child support guidelines every four years was passed to ensure that state child support guidelines are fairly applied and appropriately updated to take into account changing circumstances, including economic changes, lifestyle changes, etc. A violation of federal law cannot further a legitimate state interest. As a result, petitioner respectfully contends that the arbitrary and capricious nature and application of North Carolina's Child Support Guidelines violates his right to substantive due process.

This case is distinguishable from *Doll* where the appellants argued that the amount to be paid should only meet the "basic" needs of the children. Here, petitioner contends that due process is violated because of the arbitrary and capricious nature of many factors of the guidelines themselves. Further, the application of the guidelines in this case demonstrates that the guidelines do much more than merely rendering "some inequality" since the order here requires petitioner to pay for approximately eighty-percent (80%) of the children's reasonable needs that occur in the mother's household while the mother pays none of the children's reasonable needs that occur in the father's household when both parents make similar incomes and petitioner has the children approximately twenty-five percent (25%) of the year.

The guidelines are presumptive evidence and impact an obligor's property and event liberty interests. The guidelines have been shown to have significant arbitrary features. The respondent North Carolina should not be allowed to fabricate presumptive evidence, especially when property and liberty interests are at stake. The

federal interests at issue this case are extremely high and therefore require this Court's review. The Court should issue its Writ and accept this case because the North Carolina Court of Appeals has upheld the child support guidelines, which clearly violate a substantial federal interest.

D. PROCEDURAL DUE PROCESS

In the event this Petition for Writ of *Certiorari* is granted, petitioner will brief the issue of procedural due process in its brief on the merits.

E. EQUAL PROTECTION

In the event this Petition for Writ of *Certiorari* is granted, petitioner will brief the issue of equal protection violations in its brief on the merits.

CONCLUSION

Even though states retain broad powers over the husband/wife relationship and parent/child relationship, this Court must step in when a state is depriving a citizen of his constitutionally protected rights. The North Carolina Supreme Court's decision to deny review and therefore affirm the Court of Appeals' determination is contrary to this Court's and other appellate courts' decisions regarding basic constitutional protections of petitioner and should be considered under Rule 10 of the Rules of the Supreme Court. Petitioner put forth a *prima facie* case of the constitutional and federal violations by the use of the North Carolina Child Support Guidelines which went unrefuted by respondents. The Court of Appeals determination that the state has complied with the federal mandates of law is erroneous and the federal interests at stake are high which requires this Court's review. Therefore, this Petition for a Writ of *Certiorari* should be granted, and the decision of the North Carolina Court of Appeals reversed.

Respectfully submitted,

GEORGE B. MAST
Counsel of Record
BRADLEY N. SCHULZ
RON L. TRIMYER, JR.
MAST, SCHULZ, MAST,
JOHNSON, & WELLS, P.A.
One Courthouse Square
P.O. Box 119
Smithfield, NC 27577
(919) 934-6187

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE NORTH CAROLINA COURT OF APPEALS FILED AUGUST 21, 2007

NORTH CAROLINA COURT OF APPEALS

NO. COA06-1692

Filed: 21 August 2007

Cumberland County
No. 00 CVD 2694

RODNEY ROW,

PLAINTIFF

v.

LEIGH ROW (DEESE),

DEFENDANT.

Appeal by Plaintiff and Defendant from judgments entered 12 January 2006, 13 January 2006, and 30 May 2006 by Judge William C. Lawton in District Court, Cumberland County. Heard in the Court of Appeals 5 June 2007.

WYNN, Judge.

"The Supremacy Clause of the United States Constitution provides that federal laws supercede state

laws in conflict with federal laws".[1] In this case, Plaintiff Rodney Row contends, *inter alia*, that federal provisions under the Aid to Families with Dependent Children Act (AFDC) pre-empt parts of the North Carolina Child Support Guidelines. Because Congress has not positively required by direct enactment that state law be pre-empted in the area of child support enforcement, we hold that federal law does not pre-empt certain portions of the North Carolina Child Support Guidelines.

Plaintiff Rodney Row ("Plaintiff") and Defendant Leigh Row ("Defendant")[2] married in 1991 and had two children, born in 1991 and 1995. The parties separated in 1999 and on 24 January 2001, the trial court entered an order awarding the parties joint custody, with primary physical custody given to Defendant and ordered Plaintiff to pay child support in the amount of $700.00 per month. Thereafter, the parties filed several motions to modify custody and child support resulting in the first appeal to this Court in which we affirmed in part, vacated in part, and remanded. *See Row v. Row*, 158 N.C. App. 744, 582 S.E.2d 80 (2003) (holding the trial court did not abuse its discretion in finding the best interest of the children require the continuation of primary physical custody with defendant and secondary custody with plaintiff and the trial court failed to make

1. *Boynton v. Esc Medical System, Inc.*, 152 N.C. App. 103, 109, 566 S.E.2d 730, 733 (2002).

2. Defendant has since remarried and her surname is now Deese.

sufficient findings of fact and conclusions of law for this Court to determine whether the Guidelines were followed.).

On 2 February 2004, Plaintiff moved to modify child support and requested a determination of the legality of the 2002 North Carolina Child Support Guidelines ("guidelines").[3] The trial court modified Plaintiff's child support obligation to $1331.80 and denied review of the legality of the Child Support Guidelines. On 22 March 2005, Plaintiff filed a motion for modification of child support and custody, followed by a motion for contempt against Defendant for failing to abide by the 13 November 2001 custody order. On 26 July 2005, Plaintiff filed a supplemental amended motion in the cause to set child support, modification of child support, and determination of whether North Carolina Child Support Guidelines comply with the law.

On 12 January 2006, the trial court found Defendant in contempt for failing to make flight arrangements for the Thanksgiving 2003 visitation, as required by the child custody order. A permanent child custody order was entered by the trial court on 13 January 2006. On 30 May 2006, the trial court entered an order which concluded: that the 2002 North Carolina Child Support Guidelines are constitutional, that there was no substantial change of circumstances warranting a modification of Plaintiff's child support; that each party

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3. Subsequently, this motion was modified on 5 February 2004.

is allowed one dependant exemption as long as Plaintiff pays child support at or above the level he was ordered to pay under the previous order, and that Plaintiff is allowed to claim the older child as a dependent exemption on his federal and state income tax returns.

Preliminarily, we dismiss Defendant's attempt to appeal from the 12 January 2006 contempt order by filing a notice of appeal on 27 June 2006. Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure allows a party thirty days after entry of judgment to file and serve a notice of appeal. Here, the notice of appeal was filed more than five months after the entry of the 12 January 2006 contempt order which was a final rather than an interlocutory order. Accordingly, Defendant's appeal must be dismissed. On those same grounds, we dismiss Plaintiff's attempt to appeal from the 12 January 2006 contempt order and 13 January 2006 child custody order by filing a notice of appeal on 20 June 2006. Thus, the only appeal properly before this Court is Plaintiff's 20 June 2006 notice of appeal from the 30 May 2006 order to modify child support and uphold the constitutionality of the guidelines.

In his appeal, Plaintiff contends that the trial court committed error by: (I) upholding the constitutionality of the guidelines; (II) failing to accurately consider the evidence presented in making its findings of fact in regard to the parent's expenses; and (III) failing to deviate from the child support guidelines.

Appendix A

I.

The standard of review for questions concerning constitutional rights is de novo. *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 588-89 (2004) (citation omitted). Furthermore, when considering the constitutionality of a statute or act there is a "presumption . . . in favor of constitutionality, and all doubts must be resolved in favor of the act." *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. Of Educ.*, 55 N.C. App. 134, 144-45, 285 S.E.2d 110, 117 (1981) (citation omitted), *appeal dismissed and disc. review denied*, 305 N.C. 300, 291 S.E.2d 150 (1982).

Plaintiff first argues that the guidelines "are violative of the supremacy clause of the U.S. Constitution." Plaintiff contends that the guidelines are null and void under the Supremacy Clause for its failure to comply with the congressional standard under 45 C.F.R. § 302.56 which requires the State, when performing its four-year review of the Guidelines, to consider and analyze case data on the cost of raising children.

To understand the basis for Plaintiff's appeal, we must understand the origin of our child support guidelines. North Carolina participates in the federal aid to Families with Dependent Children program ("AFDC"), which provides benefits to certain needy families under the Social Security Act. *See* 42 U.S.C. § 601 et. seq. (2006). As a part of this act, and to qualify for federal funds, North Carolina's child support

program must conform with the requirements set forth in Title IV, Part D of the Social Security Act. *See* 42 U.S.C. § 651-669b (2006). Under the federal act, North Carolina must establish child support guidelines for child support amounts and review these guidelines "at least once every 4 years to ensure that their application results in determination of appropriate child support award amounts." 42 U.S.C. § 667(a) (2006). Under Title 45, Section 302.56(h) of the Code of Federal Regulations, which codifies the administrative interpretation of this requirement:

> a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

45 C.F.R. § 302.56(h) (2006).

"The Supremacy Clause of the United States Constitution provides that federal laws supercede state laws in conflict with federal laws." *Boynton v. Esc Medical System, Inc.*, 152 N.C. App. 103, 109, 566 S.E.2d 730, 733 (2002). When considering the issues surrounding the Supremacy Clause, the United States Supreme Court has expressed that:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.
>
> . . .
>
> The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.

Pearson v. C.P. Buckner Steel Erection Co., 348 N.C. 239, 244, 498 S.E.2d 818, 821 (1998) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69, 90 L. Ed. 2d 369, 381-82 (1986)).

Here, there is no indication that Congress pre-empted the State in this area. The federal statute

prescribed minimal requirements and encourages the State to act in accordance with the statutes, in order to receive federal funding. Furthermore, the United States Supreme Court has consistently recognized that

> the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. . . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be pre-empted. . . . Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.

Rose v. Rose, 481 U.S. 619, 625, 95 L. Ed. 2d 599, 607 (1987) (internal quotations and citations omitted).

At trial, Plaintiff's expert admitted, on cross-examination by the State, that North Carolina's child support guidelines comply with the federal regulation, 45 C.F.R. § 302.56, but continued to aver, throughout the State's cross-examination, that the guidelines are not economically sound. Based upon this testimony, Plaintiff argues that use of the incomes shares model by our guidelines is not the best way to determine a parent's child support amount. However, this alone does not make the guidelines unconstitutional. Indeed, at a

minimum, North Carolina guidelines: "(1) [t]ake into consideration all earnings and income of the noncustodial parent[,] (2) [are] . . . based on specific descriptive and numeric criteria and result in a computation of the support obligation; and (3) [p]rovide for the child(ren)'s health care needs, through health insurance coverage or other means." 45 C.F.R. §§ 302.56(c)(1) - (3) (2005).

Additionally, North Carolina's guidelines were reviewed by Policy Studies, Inc. ("PSI") in 2002. PSI updated the schedule in order "to consider more current economic factors. . . . [T]he economic factors considered in the update are changes to price levels; measurements of child rearing costs based on more recent data; changes in the federal poverty guidelines; and changes in federal and state tax rates and FICA." Plaintiff's characterization that North Carolina "merely updated the cost tables based on the same assumptions" is somewhat misleading. The review conducted by PSI took into account "current economic data on the costs of raising children[,]" however, North Carolina decided to remain with the income shares model. 56 Fed. Reg. 22335-01 (May 15, 1991). Furthermore, the guidelines were approved by the Secretary of the United States Department of Health and Human Services[4] ("the secretary") and the secretary has taken no action to reduce or suspend the State's federal funds.

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4. Apart of the secretary's duties is to review and approve the State plans. 42 U.S.C. § 652(a)(3) (2006).

Accordingly, we hold that the trial court did not error in determining that the North Carolina Child Support Guidelines are not unconstitutional based on the Supremacy Clause of the United States Constitution.

Plaintiff next argues that the guidelines violate the Equal Protection Clause of the United States Constitution. The Fourteenth Amendment of the United States Constitution guarantees that no state "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made. *Texfi Industries, Inc. v. Fayetteville*, 301 N.C. 1, 10, 269 S.E.2d 142, 149 (1980) (citations omitted). If the governmental or legislative act disadvantages a fundamental right or a suspect class, the upper tier or strict scrutiny of equal protection analysis is employed. *Id.* at 11, 269 S.E.2d at 149. "[A] class is deemed suspect when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary." *Id.* (internal quotations and citations omitted). If the equal protection does not involve a fundamental right or a suspect class, then the lower tier or rational basis of equal protection analysis applies. *Id.*

In this case, Plaintiff contends that non-custodial parents versus custodial parents constitute a suspect class and is analogous to heightened scrutiny afforded

gender-based discriminatory statutes. We disagree. Not only do non-custodial and custodial parents not fall within the definition of a suspect class, neither the United States Supreme Court nor our Supreme Court has ever held that a suspect class includes non-custodial and custodial parents. Hence, the trial court did not error by holding that Plaintiff failed to show that the guidelines as applied to Plaintiff violate his Equal Protection Rights.[5]

Next, Plaintiff argues that the guidelines violate his Procedural Due Process rights. We disagree.

Our Supreme Court has noted that "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (internal quotations and citations omitted).

Here, not only did Plaintiff file a motion concerning the constitutionality of the guidelines and a request for deviation from the guidelines, the trial court conducted a two day hearing on the matter. Plaintiff was afforded the opportunity to put on witnesses, cross-examine witnesses, and admit evidence. It is apparent that

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5. Plaintiff did not set forth an argument with regards to a fundamental right under the Equal Protection Clause, nor did he argue that the State lacked a rational basis to implement the guidelines.

Plaintiff had ample opportunity and did in fact exercise his Procedural Due Process Rights; thus, we find no error.

Plaintiff next argues that the guidelines violated his Substantive Due Process rights. We disagree.

Under Substantive Due Process, "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The U.S. Supreme Court has "recognized that one aspect of liberty protected by Due Process Clause of the Fourteenth Amendment is a right of personal privacy." *Carey v. Population Services Int'l*, 431 U.S. 678, 684, 52 L. E. 2d 675, 684 (1977) (internal quotations and citations omitted). This protected right of personal privacy includes activities "relating to marriage, procreation, contraception, family relationships[,] ... child rearing[,] and education." *In re Truesdall*, 63 N.C. App. 258, 268, 304 S.E.2d 793, 800 (1983), *modified*, 313 N.C. 421, 329 S.E.2d 630 (1985) (citation omitted). "Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest ... and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 269, 304 S.E.2d at 800 (internal quotes and citation omitted).

Here, the State has a compelling state interest in regulating child support obligations. The State wants to ensure that parents support their children, so that

the children will not become wards of the State. Furthermore, the guidelines establishes a rebuttable presumption and

> [i]f, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines

N.C. Gen. Stat. § 50-13.4(c) (2005). By allowing for a rebuttable presumption the State has "narrowly drawn the act to express only the legitimate state interests." *Truesdall,* 313 N.C. at 269, 304 S.E.2d at 800.

Accordingly, the trial court did not err by concluding that Plaintiff's Substantive Due Process Rights were not violated.

II.

Plaintiff further argues that the trial court committed reversible error because it failed to accurately consider the evidence presented when it made its findings of fact. Specifically, Plaintiff challenges the trial court's consideration of expenses for the children and avers that the trial court miscalculated the monthly expenses at $2,650.85 per month.

Appendix A

The standard of review for findings made by a trial court sitting without a jury is "whether any competent evidence exists in the record to support" said findings. *Hollerbach v. Hollerbach,* 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary. *Heating & Air Conditioning Associates, Inc. v. Myerly,* 29 N.C. App. 85, 89, 223 S.E.2d 545, 548, *appeal dismissed and disc review denied,* 290 N.C. 94, 225 S.E.2d 323 (1976).

Here, Plaintiff contends that some expenses credited to Defendant were either incorrect or not calculated for him. However, Plaintiff did not claim certain expenses on his financial affidavit and Defendant did claim certain expenses on her affidavit. Thus, the trial court considered the information as presented by the parties. For example, in Plaintiff's financial affidavit he failed to attribute any part of his mortgage, home tax, insurance, electricity, heat, telephone, grocery, eating out, car payment, gas, transportation for visitation, or maintenance for his vehicle to the children. However, in reviewing Defendant's financial affidavit she attributed part of her expenses for these items to her children.

Now, Plaintiff wants this Court to consider information outside the financial affidavit, *i.e.* expert testimony, in order determine his expenses. But, we refuse to do so. Plaintiff, upon signing his financial affidavit, duly swore "to the truthfulness and completeness of [his] Financial Affidavit." The affidavits

were competent evidence in which the trial court was allowed to rely on in determining the cost of raising the parties children.

Plaintiff also contends that the trial court miscalculated the children medical expenses because the military provides coverage at no charge. However, Defendant presented evidence to show that she provides medical coverage through her job for the children and that this medical coverage was necessary, because the military did not cover all of her daughter's medical expenses. Based on the evidence submitted at the hearing, the trial court did not err in its calculation of the medical insurance.

Furthermore, Plaintiff argues that the trial court failed to consider the tuition he incurred for private school during the summer months. However, based on the information provided by Plaintiff, via his financial affidavit, his monthly expense for tuition was only $103.00 per child. Considering he has the children for approximately two to two and half months, the trial court correctly determined Plaintiff's total expense for both children at $1,505.25 per year. If Plaintiff wanted the trial court to consider the amount of $2,472.00, which Plaintiff states is the amount of the tuition for the two months the children are in Hawaii for the summer, he should have increased his monthly expenses for tuition accordingly. Based on the financial affidavit submitted to the trial court, we find no error in the findings of fact regarding the children's expenses.

III.

Finally, Plaintiff argues that the trial court committed reversible error and an abuse of discretion in its application and deviation from the guidelines. Specifically, Plaintiff contends that the trial court erroneously applied unconstitutional guidelines to set child support and deviated "insignificantly" from the guidelines. We disagree.

In order to deviate from the guidelines, the trial court: (1) shall hear evidence; (2) make findings of fact relating to the reasonable needs of the child for support and the relative ability of each parent to provide support; (3) if the trial court determines by a "greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may deviate[;]" and (4) if the trial court deviates from the guidelines then it "shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C. Gen. Stat. § 50-13.4(c) (2005).

"A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). The trial court's "determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion,

i.e. only if `manifestly unsupported by reason.'" *Id.* (quoting *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985)).

We have determined that the guidelines are constitutional, therefore, we reject Plaintiff's argument concerning the constitutionality of the guidelines. Furthermore, the trial court relied on the Plaintiff's financial affidavit to determine his monthly expense for his children. After considering both parties affidavits, the trial determined that: ". . . A) $1,505.25/yr. while in plaintiffs primary custody[;] B) $22,610.00/yr. while in defendant's primary custody (10 months of the year), represented $2,261 per month exclusive of costs of school where the children have always attended[;] C) $7,695.00/yr. costs of school."

Based on all the evidence that was before the trial court, we cannot say that its slight deviation was "manifestly unsupported by reason." *Id.* Accordingly, we find no error.

In sum, we hold that the trial court did not error by determining that the 2002 North Carolina Child Support Guidelines were constitutional. Furthermore, we hold that the trial court did not err in its consideration of the evidence and its deviation from the guidelines.

Affirmed in part, dismissed in part.

Judges HUNTER and BRYANT concur.

APPENDIX B — ORDER OF THE NORTH CAROLINA, CUMBERLAND COUNTY GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION FILED MAY 30, 2006

NORTH CAROLINA

CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE,
DISTRICT COURT DIVISION
FILE NO.: **00 CVD 2694**

RODNEY ROW

Plaintiff

Vs.

LEIGH ROW (DEESE)

Defendant

ORDER ON MOTION IN THE CAUSE TO MODIFY CHILD SUPPORT, AND DETERMINE LEGALITY OF GUIDELINES UNDER FEDERAL LAW AND/OR U.S. CONSTITUTION

THIS CAUSE was heard by the Honorable William C. Lawton, District Court Judge Presiding over the 28 and 29 November 2005 Special Domestic Sessions of the District Court of Cumberland County, Fayetteville, North Carolina upon the plaintiff's motion to modify child support and determine the legality of the

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N.C. Child Support Guidelines under Federal law and/or the U.S. Constitution.

Plaintiff was present in court and represented by George B. Mast of Smithfield, North Carolina. Defendant was present in court and represented by Marcia H. Armstrong of Smithfield, North Carolina.

After hearing the testimony of witnesses, reviewing exhibits, reviewing the court file and considering arguments of counsel and the relevant law, the Court makes the following:

FINDINGS OF FACT

1. The plaintiff is a citizen and resident of Hawaii.

2. The Defendant is a citizen and resident of Cumberland County, North Carolina and has been a resident of the State of North Carolina for more than six months immediately preceding this institution of this action.

3. All parties have received proper notice and are properly before the Court.

4. Plaintiff and defendant were married on 10 April 1991 and thereafter divorced.

5. Two children were born of the marriage: KAYTLYN MARIE ROW ("Kaytlyn"), born 24 April 1991 and GABRIELLE ALEXIS ROW ("Gabby"), born 13 March 1995.

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6. An Order was entered in this cause on 28 February 2002 by the Honorable L. W. Payne. An Order to Modify Child Support was entered 20 December 2004 by the Honorable William A. Christian.

7. Plaintiff filed a Motion for Modification of Custody and Support on 22 March 2005 and a Supplemental Amended Motion in the Cause to Set Child Support, Modification of Child Support, and Determination of whether North Carolina Child Support Guidelines Comply With the Law on or about 25 July 2005.

8. Since the plaintiff is requesting the Court to invalidate the Child Support Guidelines as either unconstitutional or in violation of federal law, the Court will first consider the evidence as to the "reasonable needs" of the children under the facts of this case.

9. At the Court's request, counsel for both parties were asked to consider what would be the applicable law to apply to the facts of this case if there were no guidelines. Both sides agreed that without guidelines this Court would set support under N.C.G.S. 50-13.4(c), which provides "Payments . . . for . . . support . . . *shall be* in such amount as to meet the reasonable needs of the child for health, education, and maintenance, *having due regard to* the estates, *earnings*, conditions, *accustomed standard of*

living of the child and the parties, the childcare *and the homemaker contributions of each party,* and other facts *particular to the case."* (emphasis supplied)

10. The Court will therefore initially review the evidence to examine and determine the reasonable needs of the children.

11. When considering health insurance costs of a party, the Court has to look at the health care options of the party. In this case the custodial parent has three insurance options: employee only, employee plus one and employee plus family. Since defendant has two daughters she must choose employee plus family regardless of whether or not she is remarried. Therefore, this Court finds the reasonable health care costs of the children's is $112.00 per month ($167 for employee plus family minus $55 cost of employee only coverage).

12. A more nebulous "factor" in this Court's consideration of reasonable support outside of the child support guidelines is the requirement that the Court consider "the homemaker contributions of each party." Little guidance exists for the Court in this regard; however, the total number of nights the girls live with defendant and the fact that they are in defendant's custody for essentially the entire school year places on defendant a substantially

more significant burden of dealing with the majority of both the emotional needs as well as physical provision of (as opposed to payment for) food, clothing and shelter for the two girls. Certainly this Court would be remiss in not placing a "value" on defendant's "homemaker" contribution in this regard though there is practically no guidance on how to do so.

13. Though much evidence was offered as to how this Court should view plaintiff's income (because of military allowances to him due to his higher cost of living duty station), his adjusted gross income was $62,675 for tax year 2004. His monthly pay statement for June of 2005 reflects entitlements (income) of $7,013.96 (total less elevated BAH due to plaintiff's higher cost of living duty station). This translates to $84,167 per year. Subtracting the larger COLA (due to the duty station) yields $6,410.79 per month, or $76,929 per year. Plaintiff's income is basically equivalent to the defendant's income of $7,200 per year and puts him on essentially equal footing in financial ability to raise the children. It should be noted that plaintiff's base pay alone ($5,933.70 per month) is basically equivalent to defendant's annual income on a 12 month basis ($71,196 for plaintiff versus $72,000 for defendant).

14. In considering the "reasonable needs" for the parties' children, the Court has to be mindful

that they are now in the same private school that the parties enrolled them in before they separated and divorced. Therefore, the total costs of the private schooling for these girls must be considered as a reasonable need for them "having due regard for the accustomed standard of living" for the children. That cost, from plaintiff's exhibit number 20 inclusive of books, tuition, reasonable fees, as well as all accustomed after-school care, totals $7,695 for the school year. On a 12 month amortized basis this amounts to $641.25 per month.

15. Over the course of the years, the cost of transportation for the girls to travel between the parties' homes in North Carolina and Hawaii has been equally shared and is not considered in this Order in setting support. Through no fault of the children, the parties have made life choices which have put them as far apart as they are, and they should bear the costs of these choices without impacting the financial care of the children.

16. From his affidavit, plaintiff shows expenses for the two girls while they are with him. These are listed as monthly expenses. Since Gabby is with plaintiff slightly longer than Kaytlyn, her expenses are for roughly 2 1/2 months while Kaytlyn's are for 2 months. These amounts total $836.25 for Gabby and $669.00 for Kaytlyn.

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17. From the affidavit of income and expenses offered into evidence by the defendant, the Court finds these expenses as reasonable. Defendant was not called in plaintiff's case nor extensively examined in her own case. The Court has made some adjustments in the following categories to the expenses of the children, taking into consideration that these expenses would be incurred in large part whether or not the children lived with defendant:

A) "Shelter" expense are allocated to the children in an amount of $500

B) "Transportation", sub-category "car payment" should be reduced to the amount of $100 to represent a wear and tear value on the car defendant would have anyway attributable for transportation needs for the girls

C) "Transportation" sub-category "car insurance" should be $0 as this State requires insurance if you drive a car, with or without children.

D) "Medical insurance" should be $112 as provided in the findings above

E) No adjustment to the "counseling" expenses. Ample support was give for their reasonableness in the custody trial and these expenses could go even higher.

F) "Education" should be set at $641.25 based upon the above findings regarding the costs of the private school the girls have attended since before the parties separated.

18. From the evidence the reasonable needs of the children herein, calculated from the expenditures of each party for the girls while they are in the parties' respective custody and having due regard for the accustomed standard of living for the children total as follows:

A) $1,505.25/yr. while in plaintiff's primary custody

B) $22,610.00/yr. while in defendant's primary custody (10 months of the year), represented $2,261 per month exclusive of costs of school where the children have always attended

C) $7,695.00/yr. costs of school

This total is $2,650.85 per month both parents spend on the girls over the year. Since the defendant has many of the expenses listed for the girls (perhaps exclusive of food, clothing and transportation) for a full 12 months, the amount she spends is probably higher. Factoring back into the expenses all but food, clothing, utility and transportation expenses for the girls for 2 more months in the sum of $1,639.00 per month,

the monthly total allocated to the girls, as spent by both parents, is $2,924.00 per month.

19. Under the current child support order, plaintiff is paying $1,331.00 per month for the children.

20. Under the current custody order the plaintiff has the girls a full two months of each summer, and has Gabby for roughly two weeks longer in the summer. He also has one-half of Christmas school break and one week every other Thanksgiving. Consequently, the plaintiff has approximately 80 overnights with Kaytlyn each year and approximately 90 to 100 overnights with Gabby each year. Assuming the three worksheet options under the current guidelines are legally sound, plaintiff does not currently have the 123 overnights that was so vehemently and persuasively argued by plaintiff as being arbitrary.

21. Even taking an overly simplistic approach to child support of each party simply sharing equally the total cost of raising these two girls throughout the year, each would be obligated to spend 1/2 of $2,650.85 per month or $2,924.00 per month, depending on which approach to expenses one chose in finding 18 above. Either way the plaintiff's share is at or above his current support obligation under the guidelines and such an "equal" sharing of costs of these two girls does not take into account the fact that

defendant has both girls roughly 75% of the time (Kaytlyn slightly more) nor does it factor in any amount for defendant's "homemaker contributions" as the primary custodian.

22. Therefore, even assuming the guidelines are not available in this case, plaintiff could conceivably be subject, under the economic facts in this case as to these children, to a child support order similar to or higher than the one he is currently under.

23. Plaintiff is a Major in the U.S. Army and is currently stationed in Hawaii. His actual pay or gross income upon which child support should be based is subject to significant dispute. Rather than address his tax returns, which in addition to income from employment address such voluntary investment choices as maintaining rental property, the Court will give its attention to plaintiff's salary.

24. Plaintiff's most recent leave and earnings statement provided to this Court reflect his "base pay" to be $5,933.70 with an additional meal allowance (BAS) of $183.99 per month. He also receives a monthly allowance for simply having a family (BAQ) of $143.10. As the Court understands the evidence, these three sums are paid regardless of where plaintiff is stationed. These amounts total $6,260.79. The BAQ is non-taxable. The plaintiff is also paid a housing

allowance (BAH) in some amount regardless of his duty station. This sum is non-taxable and is significantly higher to plaintiff because of his duty station in Hawaii. It is currently (based on his 6-30-05 statement) $2,107. Plaintiff also gets a cost of living adjustment (COLA) because he is stationed in Hawaii. He would not receive a COLA for a N.C. duty station. This sum is $603.17.

25. In his previous support order Judge Christian deducted $728.00 from plaintiff's BAH in computing plaintiff's income. That sum reflected 48.7% of the BAH on plaintiff's November 2001 leave and earnings statement. Such a deduction was based on evidence before him which he, at the time considered. Since all officers receive a BAH allotment, Judge Christian's deduction is this Court's only measure of the increase in BAH due to plaintiff's duty station. Applying this same deduction to plaintiff's BAH on his 6-30-05 leave and earnings statement, the minimum BAH this Court should add to plaintiff's income is $1,081.73. Judge Christian also did not consider the Hawaii COLA as income to plaintiff. This Court takes the same position, as these children are being support in North Carolina and the COLA is added to plaintiff's pay to compensate for a higher cost of living that should enable plaintiff to have no decrease in disposable income based on more expensive duty stations.

26. Following similar reasoning as did Judge Christian, the Court finds plaintiff's income for child support guidelines purposes, is $7,342.50 per month. Using information provided in defendant's affidavit and most recent pay stub, the Court finds defendant's monthly income for child support guidelines purposes to be $6,400.00 per month.

27. Neither party in this trial offered any evidence of the amount they expended on their parts of the cost of air transportation between the costs of the two homes for the children so the Court has no evidence upon which to allocate cost as an extraordinary expense of either party.

28. Comparison of the previous child support guidelines to the newest child support guidelines reflects a substantial change in methodology in some regard, though there is in this proceeding no concrete evidence of the methodology used by the commission to make the changes. When Judge Christian entered the previous Order, a combined parental income of $10,291.65 yielded a basic child support obligation of $1,631. In today's guidelines for two children $12,900 of combined income would yield the same basic child support obligation.

29. Using today's child support guidelines to the facts of this case and finding, as Judge Christian did, that private school expenses for these

children are valid extraordinary expenses since the parties placed these girls in this same private school while they still lived together, the Court would find that defendant has an extraordinary expense of $614.00 per month for the school. This amount is the total 2004-2005 school year minus drop-in childcare expenses of $335.00. When these childcare expenses (on a monthly basis) are added in, along with plaintiff's dental insurance and defendant's health insurance, the "guideline" amount of child support plaintiff should pay is $1,314.00, less $23, or $1,291.00 (see worksheet).

30. Should the guidelines be held to apply using the same or similar deviations as adopted and found by Judge Christian, which this Court finds to be equally supportable by the evidence, there is not a substantial change in circumstance as would warrant a modification of the previous child support order.

31. For purposes of examining plaintiff's income and expense situation, exclusive of expenditures on the children in this case, the Court will examine plaintiff's income including the full BAH and the COLA, along with his current reasonable expenses of living in Hawaii. The only thing not considered will be the parachute pay which plaintiff testified stopped in June 2005. The Court is using the June 2005 leave and earning statement for these purposes

as the most recent evidence of plaintiff's income of $89,700.96 per year. Subtracting taxes, life insurance and dental insurance (but not voluntary "retirement" contributions), his take-home pay is $7,957.47 per month.

32. Plaintiff's reasonable expenses with 12 month amortization of his expenses for the children, and the modification by the Court to the monthly categories of gifts and car maintenance, currently are $4,417.00 (the $402 car payment will be gone in June 2006), including adding $350.00 IRA contribution instead of $1,451. The Court gave no consideration to the Discovery Card, AMEX or TSP loan debt because that was incurred by plaintiff to open up a stock investment fund. Instead of considering the home equity loan and personal loan incurred to pay attorney fees, the Court will add back to these "reasonable" expenses the difference between plaintiff's original home mortgage of $2,162 and the current mortgage of $1,562. This increases plaintiff's reasonable living expenses to $5,017.00 per month.

33. Plaintiff has "available" income with which to contribute to the support of his children of $2,940.47.

34. Defendant's income and expenses are similarly evaluated. Her year to date earnings as of 30

November 2005, including commissions, is $70,404.15. Her "net" income is $4,707.43 per month after deducting taxes, Medicare, life insurance and vision care.

35. Making adjustments to the categories of club memberships, gifts, clothing and medical, the Court finds defendant's reasonable expenses are $2,571.00. Added to this should be some transportation costs, as was allowed for plaintiff. Since evidence was really sparse in this regard at trial, the Court will allow the same amortized amount to both parties, which will increase defendant's monthly expenses to $2,778.00. The Court can only assume since defendant did not testify that she too has attorney's fees debt. The Court chooses not to consider this in allocating and determining "reasonable" funds available to spend on the children.

36. Defendant has "available" income with which to contribute to the support of her children of $1,929.43.

37. Much of plaintiff's expert evidence addressed the use of a "Worksheet B" approach to the dividing the support among these two girls without regard to the "123 overnight" threshold for use of a Worksheet B. While, in some regards, this may seem logical, such an approach to support still assumes they apply in some way. However, if the Court were to rule

the guidelines in violation of the Constitution or federal law, then they are void and of no usable application to this Court. To use a "Worksheet B" approach would not be a deviation to, but a disregard of, the guidelines. This Court is of the opinion that using a "Worksheet B" approach to the facts of this case is much more than a deviation from the guidelines as plaintiff has alternatively sought in his motion. The deviation contemplated by these guidelines, if and assuming they are legally valid is a deviation from an applicable worksheet and not a substitution and use of a different worksheet to the facts where that different worksheet should not be used. The guidelines either are legal and applicable using legislatively mandated worksheets, or they are not.

38. Having arrived at this distinct juncture in this case, the Court will now address whether or not the facts from expert witnesses warrant a ruling that the N.C. Child Support Guidelines violate the U.S. Constitution substantively, or whether the guidelines as enacted violate federal law.

39. What cost of living differences there are between Hawaii and North Carolina have been considered by this Court in that the largest additions to plaintiff's income have been considered as offset by the increased cost of plaintiff's monthly living and subtracted from his "gross income" as defined by statute.

40. Although argued by the plaintiff, this Court does not need to rule on the "parenting time multiplier" issue because plaintiff's actual overnights are substantially less than 124.

41. Plaintiff contends that the method behind the creation of the N.C. Guidelines is fatally flawed or so erroneously based in its assumptions as to make them arbitrary and capricious.

42. If the evidence presented by expert testimony satisfies the Court that the methods used in formulating the guidelines are so erroneous in their foundation, then plaintiff has overcome the presumptive application. Yet, if the guidelines conclusive presumption does not apply then it follows that the guidelines themselves don't apply. If the guidelines do not apply, then they do not apply in their entirety and the Court must revert back to N.C.G.S. 50-13.4.

43. The guidelines are gender neutral, applying with equal force to father or mother, regardless of which is the primary custodial parent. Under these gender neutral guidelines, both spouses are treated equally under the law. Any perceived "bias" can only be alleged against the trier of fact as the statute references only the "spouse".

44. It is true that the cost of living varies from state to state and that the cost of living in Hawaii is

higher than the cost of living in North Carolina. The guidelines themselves are based upon principles formulated using data gathered nationwide. Yet it is clear to this Court that such guidelines would not wholly reflect differences in the two states involved in any given case. This fact, however, would not make the guidelines so fundamentally and factually unsound nor so arbitrary as to be constitutionally defective.

45. Additionally, in calculating the gross income of the plaintiff the Court has considered the difference in the cost of living in Hawaii and North Carolina by deducting from his total income those cost of living increases added to his pay.

46. In resolving questions of whether a statute violates the equal protection clause, the first inquiry is whether a "suspect class" or a "fundamental right" is involved. Here the contest is a contest between a primary and a secondary custodial parent regardless of sex. There is no "suspect class" involved in this case. The right involved is the right of a parent to make support decisions regarding their child. There is no "fundamental right" recognized by the Constitution in this case. Thus, any constitutionality question is tested by whether the state law in question has a rational relationship to a legitimate governmental interest. Here the governmental interest is that

of the state to be sure the innocent children of voluntary relationships are supported adequately, according to the means of the parents.

47. If there is more than one methodology behind the formulation of guidelines, does the use of one over another make a statute arbitrary and capricious? The evidence herein establishes that some states utilize one method of formulating guidelines while other states use a different method. North Carolina is not alone in adopting the methodology it uses. Even if this Court were to prefer a different method of formulating guidelines, it would be error for this Court to supplant its choice over that of the legislature of North Carolina unless it could conclude the method used clearly fails to pass scrutiny under the "rational relationship" test.

48. There is no evidence offered before this Court that the Secretary of Health and Human Services of the United States has failed to approve the child support guidelines of this state nor is there any evidence at all that the federal government has undertaken to reduce the state's federal block grant because of this state's failure to comply with the Federal Regulations promulgated under 42 U.S.C. §651 et seq.

49. The facts of this case do not show that North Carolina has failed to "analyze case data" under 45 CFR §302.56(h). Nor does the State (or defendant) produce any evidence that the State has complied with this regulation. A lack of evidence is no evidence and the plaintiff has the burden of proof on this issue. The federal interest that is involved in this case is the same as the state interest: obtaining and enforcing child support orders against non-custodial parents.

50. Plaintiff's experts argue that basing the North Carolina Guidelines on methods of formulation of "using intact family national data" is not allowable, or should not be allowable where families in all these cases are no longer intact. While this Court is not intimately familiar with child support laws of other states, our legislature says that one of the considerations of courts in this state in calculating child support is the "accustomed standard of living of the child(ren)" presumably when the family was intact. So, as to North Carolina this data may, in fact, be more relevant than under other states' statutes. Certainly, this underlying factual data used to formulate our guidelines seem to be more relevant *to our state statute*, and, arguably less arbitrary.

51. Where, as here, multiple methodologies for formulation of child support guidelines exist,

and a state chooses to adopt one methodology over others; and where one methodology to a court may seem more reasonable to have been used than the one that was used, the debate is one of reasonableness and logic of choice. Such debatable issues are for the legislature and not for the courts. The evidence here is that different methods and uses of different types of data are in existence for the creation of state child support guidelines. More than one state has adopted the same foundation for guidelines as that used by North Carolina. Other states have adopted other methods. Whether or not this Court agrees that other methodologies may have been better choices for creation of the guidelines is not the issue in this proceeding. This Court has to be satisfied that the basis used by the North Carolina legislature, and the commission charged with creating and reviewing the guidelines, is so inherently unreasonable as to be unconstitutionally arbitrary and capricious or to be in violation of federal law.

52. The interest of an innocent child to be adequately supported is the interest to be protected by this state's child support laws. The evidence in this case is that the data used in formulating the guidelines is data compiled concerning the costs of raising children.

53. The duties of a primary parent such as defendant exceed those of a non-custodial parent. There are daily general welfare decisions and daily emotional traumas that defendant must deal with. Such responsibilities fall upon defendant roughly seventy-five percent of the time. These additional responsibilities have value though an exact amount is virtually impossible for a court to set. It seems this is what the legislature had in mind when courts were required to consider "homemaker responsibilities" in setting child support. In this, and in other respects custodial parents and non-custodial parents are not equally situated in fact or under the law.

54. The documentary evidence in this case calls into sharp and warranted question the wisdom of the choices of the legislature of North Carolina. The same evidence argues persuasively that wiser and, according to plaintiff's experts better, data could have been used in formulating and reviewing guidelines. However, this record fails to establish that the state of North Carolina failed to consider economic data and case data regarding the review of and application of the guidelines.

55. Since many of defendant's expenses allocated to the children continue to occur on a monthly basis even while both girls reside continually with plaintiff for two months of the summer, it

would be contrary to reality to find that defendant has no expenses for the two children while they reside with plaintiff for the summer.

56. The deviation this Court has made in computing plaintiff's income for guideline purposes were made to address the circumstances unique to this case because the military's increase in the housing allowance and the addition of a cost-of-living adjustment for plaintiff's higher cost duty station is offset substantially by the actual increased costs of housing and living in Hawaii. This means that these two categories of increased income are not actually increasing plaintiff's available income. This is believed to be a fair adjustment to accommodate plaintiff's unique situation.

57. In this case the facts show that while both girls are with plaintiff for around two-thirds of the summer, he does have costs. In comparing the expense obligations of both parties, however, and spreading their costs over twelve (12) month period, plaintiff's costs amortized over twelve months are far less substantial than defendants. Considering the accustomed standard of living of the children in this case and their reasonable needs based on that standard, plaintiff is paying less than one-half of those reasonable needs while having more "available" income and having the girls roughly 25% or less of the time.

58. The total amount that the guidelines would attribute to both children in this case is less than what this Court finds to be the reasonable needs of the children under the analysis required by N.C.G.S. 50-13.4.

59. The record reflects, and plaintiff's expert testified, that plaintiff sought to obtain evidence (through record seeking and even contact with guidelines commission members) of the mechanisms and the thought processes of the commission charged with reviewing the guidelines. Plaintiff presented what his experts were able to maintain and discern.

60. The federal regulations require that "as part of a review of a state's guidelines . . . , a state must consider economic data on the cost of raising children and analyze case data . . . , on the application of, and deviation from the guidelines." The burden of proof of a state's failure to do that falls in this case on plaintiff. This Court has reviewed the documents and re-reviewed all testimony and is unable to find factual proof (as opposed to conjecture) that the State of North Carolina failed to comply with the federal regulations. The fact is that the amount of income giving rise to the basic child support under the previous guidelines used in the previous order is now over $2,500.00 more under the new guidelines. This means that upon some data facts or statistical analysis, the

commission that reviewed and modified the North Carolina Guidelines either found the cost of raising children had gone down, or the appropriate amount of support due in a given case should be lowered, or both. While this Court does not have in this record the facts behind this change, the commission or the company used to review the guidelines under auspices of the commission found reasons for making these significant changes. A lack of specifics behind the changes is not proof that North Carolina failed to follow the mandates of the federal regulations.

61. There is ample factual data in this case to support the presumed (by statute) application of the child support guidelines. It is the source of this data and the family structure giving rise to the data that is the valid bone of contention in this case. Plaintiff is asking the Court to substitute its judgment over that of a legislature that enacted the statute or that of the commission created by the legislature in the statute.

62. There is no legislative history produced for this Court surrounding the North Carolina Legislature's decision-making process. Nor is there in this case any evidence of the hearings or deliberations of the commission created by the legislature to establish this state's guidelines. This is not any fault of the plaintiff's

efforts. The Court does have the reports and the explanations of the factually accurate data that was used by the commission.

63. North Carolina has used the firm of Policy Studies, Inc. to analyze data and update guidelines since the inception of its guidelines. The data that has been used by North Carolina for its guidelines is the income sharing model guideline of this company which is based on intact family (as opposed to separate family households) data on the cost of rearing children.

64. Plaintiff's expert R. Mark Rogers had written contact with employees of Policy Studies, Inc. as well as employees of the North Carolina Administrative Office of the Courts seeking additional "documentation" of how North Carolina arrived at its most recent and updated guidelines.

65. In addition to the sources of data relied on by Policy Studies, Inc., there are other national resources on the cost of raising children and different studies based on different data used by the guideline commissions of other states. All these resources were used by Mr. Rogers and examined by him in order to reach his conclusions that the North Carolina guidelines have no rational basis to be used to set the child support obligation of persons now divorced and in completely separate households. It is Mr.

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Roger's contention that many of the assumptions under the North Carolina child support guidelines are without economic foundation because (1) the separated and divorced parents live in independently separate households with independent costs and (2) the underlying factual data relied on by North Carolina for the cost of raising children is based upon data from intact families with only one household to maintain. This is the gist of his position, though it is more complex than that when analyzing economic data as it relates to a number of different underlying assumptions and varying factual patterns.

66. In assessing reasonable disposable income available to both parties in this case and in making reasonable adjustments, to the expenses of the parties, this Court has determined that, at these parties incomes, there actually is income of both parents available to pay 100% of all the reasonable expenses of the children in this case, based upon the children's accustomed standard of living chosen by the parties when they where together.

67. The problem the Court is having in considering the evidence of Mr. Rogers and the contentions of plaintiff is that no data or methodology will apply to every situation or familial arrangement conceivable for separately living parents. For instance, if both parents have remarried and

allocate fixed family expenses among, at least, the two adults in the household then the "intact family data" (inasmuch as it is based on sharing of fixed family living expenses) would seem to be an appropriate "expense/cost" data source for setting "guideline support." On the other end of the spectrum, where a non-custodial parent has multiple children with multiple partners in child support cases originating in separate years, even while the non-custodial parent's income stays the same and each partner has a similar income, each succeeding "guideline child support" will be less than the previously set one(s), leading to an unequal treatment of the children. So even though much of the argument put forth by plaintiff makes much sense, the truth is, or at least this Court finds, that the North Carolina legislature was making a reasoned selection from options where no option will "ideally" cover every conceivable situation.

68. This Court does not fully understand the "multiplier" concept of the shared custody worksheet, but is also not at all comfortable with coming to the conclusion that that idea is so fundamentally flawed as to be without any rational basis in fact.

69. Plaintiff's expert points to valid deficiencies in the economic methods and studies that form the basis for the North Carolina guidelines. Yet,

in many instances, these economic methods are, at best, the author's best effort to choose general approaches to attempt to approximate economic events in varied situations. As best this Court can ascertain, this is the nature of almost every economy covering a large demographic area or population. Significant flaws can be found in all of the methodologies when comparing them to a specific factual scenario that has some aspect not contemplated. The truth is that economics seems more an art than a science. It seems to be founded on statistical likelihood. Even plaintiff's expert's critique of the basis for the North Carolina guidelines is full of the language of "hopefully applicable" economic data. On page 9 of Mr. Rogers' critique of the guidelines the following statement is made about the estimates of child costs:

> There is *reason to believe* that this assumption is invalid; children are *probably* "food intensive". That is to say the percentage of the family's food that is consumed by children is *probably greater than* . . . . (emphasis supplied by the Court).

The guidelines use economic probabilities to give best estimates of costs of raising children. More than one of such probabilities may be

accurate in some specific fact situations and not in others. Probably none will always apply and many will apply differently, and more, or less, appropriately in a given factual scenario.

70. While plaintiff's expert does point out real problems with the assumptions upon which North Carolina's guidelines are based and argues that better data for single-parent households is available, the fact is that plaintiff is in a single-parent household but defendant is in a two-adult "intact family" household where costs of living are shared between a husband and wife. So intact family data is appropriate for defendant while less appropriate for plaintiff. Likewise single-parent data based guidelines would be appropriate for plaintiff but less appropriate for defendant. A close reading of Mr. Rogers' critique of the North Carolina guidelines shows that there are many differing opinions on appropriateness (i.e. see pages 10-11). In truth no national data accommodates all factual parent/family scenarios; and, as best this Court can ascertain from reading the PSI Study (Plaintiff's Exhibit 31) and Mr. Rogers' critique, no nationally collected economic data addresses the parent having multiple children by multiple partners.

71. The North Carolina legislature through its guidelines commission, created guidelines that may be imperfect to appropriately address all

child support scenarios which come before North Carolina Courts. However, it made reasoned choices from conflicting opinions in developing guidelines which in many regards make reasonable efforts to appropriately address many child custody scenarios. It is clear to this Court that the guidelines may not always appropriately account for all family factors in all cases. In this Court's experience, neither did the child-support-setting procedures which pre-dated the guidelines. Under the pre-guideline procedure, any case could be tried before five different judges, with likely at least three significantly different child support awards based on the same factual evidence.

72. In the plaintiff's critique of the North Carolina guidelines, one criticism (that North Carolina has blindly followed the intact family income-sharing data) summarizes on page 18 that the income shares methodology of treating child-related tax benefits as higher available net income but not as an offset has been to raise the amount of child support obligors must pay even as net child costs have been falling . . .". This analysis flies in the face of finding number 28 above that the facts are that under the newest revised North Carolina guidelines it takes roughly $2,700 more income today to yield the same basic child support obligation as under the previous guidelines.

Appendix B

73. North Carolina Courts still have the power to deviate from the guidelines to effectuate a sharing of costs as overnights increase if the results without such deviation exceed the reasonable needs of the child. So plaintiff's contention that this is one of the assumptions, or presumptions, that make the guidelines unconstitutional is without merit because any alleged arbitrariness, assuming such exists, can be dealt with through deviation, or rebuttal.

74. Contrary to plaintiff's assertion, visitation costs can be factored in to the guidelines as an extraordinary expense of a party should the Court find it factually appropriate to do so in a given case.

75. Since defendant does have significant reasonably allocated fixed costs for the two children, even when they spend their two months with plaintiff, the Court, decided against setting plaintiff's child support for only 10 months out of the year. As plaintiff's witness testified through his critique "fixed costs are significant shares of overall child costs. . . ."

76. The Court has not used the transportation expenses of the children in this case because they are substantially, though not exactly, equally shared by the parties and the plaintiff earns measurably though not substantially more income than defendant.

Appendix B

77. The Court has examined closely plaintiff's exhibits 26(c) and 26(d) paying some special attention to the ways plaintiff's expert has calculated plaintiff's child support. Quite frankly, though the Court does understand the alleged inequities cited by plaintiff's expert and does agree that there are some foundational problematic issues with the child support guidelines, this Court cannot ignore the fact that these very parties before it voluntarily and unitedly placed these girls in private school and gave them an "accustomed standard of living" that includes such school and its benefits and amenities. Nor can the Court ignore that the total reasonable costs of these two girls in both households exceeds $2,900 per month.

78. Both parties have separate fixed mortgage expenses and the Court is not considering the largest "cost-of-living additions" to plaintiff's income. In closely examining what plaintiff argues to be reasonable calculations of his child support obligation on pages 6-11 and 15-17 of exhibit 26, the Court cannot accept, as plaintiff's expert does, that these proposed supports obligations are "reasonable".

79. Plaintiff, on a factual truth that defendant must deal with substantially all of the physical, educational, emotional and spiritual issues of these two children (whose "reasonable dollar" expenses are found to be in excess of $2,900 per

month) for 75-80% of the time, would have this Court enter on the basis of his expert's assessment of "economic soundness" awards of $522 (17.85% of the total expenses of the girls) or $315 (10.77% of the total expenses of the girls) or $527 (18.02% of the total expenses of the girls). Frankly, any of these options, this Court finds are more arbitrary and capricious and unreasonable than blindly and without question following the guidelines. To pay so little to the custodial parent who has the girls 75-80% of the time is simply, in a word, unrealistic.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. If the child support guidelines do not apply under the facts of this case, the Court must base its decision on N.C.G.S. 50-13.4(c) and the "accustomed standard of living" of the children (*Williams v. Williams*, 261 N.C. App. 57).

3. Child support is not limited to the provision of absolutely necessary items if the parents can provide more; thus support should allow the children (innocent victims in their parents'

decision to separate and divorce) to live in the same fashion, as nearly as practicable, as if the family were still intact.

4. The guidelines and the legislatively authorized commission which created them (and revisits them every four years) are legal and enforceable, using mandated worksheets, or they are not legal and enforceable. If they are not legal under the Constitution or federal law, neither the guidelines nor their worksheets are usable by the Court. Rather the Court must apply N.C.G.S. 50-13.4 and decide support as therein provided on the facts of each case.

5. The guidelines provide for three distinct child support scenarios (for simplicity sake denoted as Worksheet A, B or C). These same guidelines allow a court to deviate from the guidelines in each scenario where the facts warrant a deviation. However, it is not a deviation to use or apply a Worksheet B to a "Worksheet A" fact scenario. This would be more than a deviation; rather, such would not be legal under current law since the commission's guidelines are law this Court is called upon to follow. Whether or not the Court agrees with the guidelines, as law, the Court is not free to rewrite them under the guise of a deviation.

6. Implicit in all of the appellate decisions in the N.C. Court of Appeals and the N.C. Supreme

Court interpreting and applying the N.C. Child Support Guidelines is the fact that our appellate Courts find that the procedure by which the North Carolina legislature establishes and enacts child support guidelines, to comply with the mandates of federal law, passes constitutional muster.

7. Notwithstanding the above, this Court has been asked to either declare the N.C. guidelines substantively unconstitutional as violative of individual parents' right to privacy; or at least, as being arbitrary and capricious as applied; or declare them to be in violation of the federal law pursuant to which they are enacted.

8. Under the "rationality" standard of review of constitutionality of state laws under the equal protection clause of the U.S. Constitution, legislatures of a state are considered to have acted within their constitutional authority if there is a reasonable basis for the law and rational relationship to a legitimate state interest, even if some inequality may result from the statute in question.

9. The North Carolina guidelines establish a presumptive level of support to be obtained from both parents. The unanswered question is whether the presumption can be "rebutted". The statute at issue herein seems to attempt to answer this question by allowing the Courts to deviate from the guidelines.

10. This Court does not agree that the child support guidelines adopted by the enabling statute of the legislature of this state have violated any recognized right of a parental privacy in the U.S. Constitution as regards to decisions of parents to provide support for their children.

11. The plaintiff herein does have standing necessary to bring the constitutional challenges raised herein by his motion. Therefore, the Court is attempting to address them all in its Order.

12. By enacting 45 C.F.R. §302.56(h), the federal government has not set out how a state must analyze case data as it reviews its guidelines. No exact manner is given.

13. Federal laws respecting child support have not pre-empted a state's rights and obligations to legislate the setting, enforcement and collection of child support. As long as a state's laws comply with the language of federal statutes, remaining free from federal sanctions for violation of federal regulations enacted under federal law, the state statutes will not be in violation of the supremacy clause of the Constitution. Congress had no intention of undertaking to oversee the setting and collection of child support in the 50 states. To hold so, the evidence must be clear and convincing that Congress intended to take such matters over from the 50 states by

implication, which is not present here, or by direct conflict, not present here because the interests of both governments are the establishment and collection of support for innocent children.

14. The interests of innocent children in receiving adequate support from separated or divorced parents should subjugate the right of privacy of parents in an intact household to make joint decisions concerning their children. The lead case cited for the pro-position that parents should be able to make child-rearing decisions without over-bearing interference by the state, as a matter of a constitutionally protected right of privacy, is so factually distinguishable as to be inapposite. It concerns a "breathtakingly broad statute" that allows any third party "to seek visitation with children". The statute at issue herein is neither breathtakingly broad nor does it concern any people's rights other than the two biological or legal parents of a child *who have competing interests in the issue at hand.* The holdings in that case, as well as the constitutional dicta must be considered in light of those facts.

15. Regardless of the wisdom, or lack thereof, of any legislature's choices in formulating child support guidelines, the application of the child support guidelines is not purely mechanistic. The statutory option given to both parties to

seek deviation from them on factual proof satisfactory to the trier of fact does allow the Court to pay attention to some, though not all, of the unique facts of a given case as those facts impact the amount of and the ability to pay guideline support.

16. Deficiency in compliance with federal law is not legally the same as conflict with federal law.

17. It is this Court's opinion that rebuttal of the presumptions underlying the guidelines themselves removes the application of the rebutted guidelines totally from application in this case. If they are rebutted at their foundation, then they do not apply and, thus, plaintiff may not argue the application of what is liked in them and disregard what is not liked. For the Court to do this would be tantamount to re-writing the guidelines, which is a legislative function.

18. Federal law, under which all states have created guidelines, require a rebuttable presumption that the amount of support called for in a given case is the appropriate amount of support. Though the guidelines must be applied in all cases, the amount is subject to rebuttal, as plaintiff seeks to do herein. Application of either party, by equal right and equal access, to deviate from the guidelines is the statutory mechanism to rebut the presumption. In this

regard the North Carolina guidelines meet that federal requirement.

19. The guidelines established in North Carolina meet the specific statutory language of 45 C.F.R. §302.56, which set minimums which must be met by the states, though plaintiff has logically and forcefully challenged the choice of methodology selected by North Carolina in meeting these minimum requirements.

20. Plaintiff has failed to carry its burden of proof to show through evidence that North Carolina has failed to comply with 45 C.F.R. §302.56(h).

21. The divisions of "custodial parents" from "non-custodial parents" establishes a classification subject to legal examination, but it is not a suspect classification subject to strict scrutiny or the intermediate scrutiny given to classifications made on the basis of, i.e. gender.

22. A presumption is unconstitutional where there is inadequate, as opposed to objected to, factual data from which the presumption is to flow. There is more than one "family structure-based source" of the data from which the guidelines of a state may be created. The plaintiff does not prove that the data used is non-existent or substantially erroneous. Rather the plaintiff's argument is that there was a better and more apprapo-to-the-separated-family source from

which to derive the otherwise factually accurate data on which the guidelines were based. It is the (1) absence or (2) inherent inaccuracy of the facts giving rise to a presumption which makes a presumption unconstitutional. A poor choice of one course of data from multiple sources of data by a legislative body does not mean the presumption is constitutionally defective (unsupported by fact). The appropriate remedy to this issue in this case is to persuade the legislature to use "more approropas" factual data source from the multiple, but accurate data sources available to it and its commission.

23. Though the guidelines themselves are presumed to apply in child support cases in North Carolina, they provide, within themselves, a party's ability to rebut the strict application of the guidelines and a Court's ability to substantially deviate from the guidelines either way on factual proof that the strict application of the guidelines will not meet or will exceed the "reasonable needs" of the child(ren). The North Carolina statute does not deny any parent a fair opportunity to rebut its strict application, nor does it deny this Court the right to deviate from it.

24. While the reasoning for the choices made by the State, or by agents of the state, have earnestly and effectively been called into question, this Court finds that the choices that were made are

not inconsistent with the applicable specific language of the federal statutes herein at issue or the federal regulations promulgated thereunder. Similarly, this Court finds that the current child support guidelines do not circumnavigate the federal statutes and regulations.

25. Regardless of the ultimate outcome of this case in the court system, the current level of plaintiff's support does support plaintiff's entitlement to claim one of the children as an exemption for tax purposes at least until the oldest child ages out of any child support order.

26. Though the North Carolina guidelines do provide that the custodial parent is considered to get any/all child tax exemptions for tax purposes, North Carolina trial courts do have the authority to allocate them when it deems the facts warrant as this Court has done here. Thus, the "presumption" in the guidelines is not conclusive and not a "fatal flaw" to their constitutionality.

27. Accounting errors; choices of data utilized from multiple available sources based on a myriad of different economic theories and assumptions; application of factors and tax analyses from more than one option do not, as a matter of law make the chosen guideline methodology in this state unconstitutional under the "rational basis" test that is applicable here.

28. The North Carolina guidelines do not violate the clear literal language of the federal statutes and regulations applicable herein, based upon the evidence before this Court.

29. The North Carolina child support guidelines, whether or not one agrees with or approves of the factual data upon which they are in part based, do assess responsibility for support without regard to gender and do consider the income and financial abilities of the parents.

30. Whether one agrees with the economic foundations or the North Carolina guidelines, in whole or in part, lack of "economic soundness" does not translate to unconstitutionality in this case.

31. It would be error for this Court to substitute its choice over that of the legislature of this state without being satisfied from the evidence that the method of formulating the child support guidelines of this state, that are required by federal law, fails to pass judicial scrutiny under the "rational relationship" test.

IT IS THEREFORE, **ORDERED, ADJUDGED AND DECREED** as follows:

1. Though challengeable, or arguable, or questionable, the North Carolina Child Support Guidelines are not unconstitutional under any of the theories argued by plaintiff.

2. The child support guidelines of this state do comply with the literal language of the federal statutes and regulations which apply.

3. The matters presented so articulately by plaintiff's evidence are matters that are appropriately addressed by the Legislature of North Carolina.

4. Under the current guidelines of North Carolina, and with the deviation adjustments made by this Court in both directions to address both the appropriate incomes of the parties as well as the reasonable needs of the children in this case, the most significant of which, private schooling, was initiated by the parties while they were still together, and considering the incomes and expenses of the parties herein, the support of the plaintiff would change by only $40.80, establishing that there has not been a substantial change of circumstance warranting a modification of plaintiff's child support.

5. This Court has deviated from the guidelines and does, hereby, additionally allocate one dependant exemption to each party for so long as both children are subject to this Court's child support jurisdiction and plaintiff is paying an amount of child support at or above the level he is paying under this and previous orders.

6. Plaintiff shall be allowed to claim Kaytlyn as a dependency exemption on his federal and state income tax returns. Defendant shall be allowed to

claim Gabrielle as a dependency exemption on her federal and state income tax returns.

7. Plaintiff's Motion to decrease child support is denied.

8. Except as specifically modified herein, the prior order of this Court entered on 6 December 2004 setting plaintiff's child support obligation shall remain in full force and effect.

This the 24 day of May 2006.

s/ William C. Lawton
THE HONORABLE WILLIAM C. LAWTON
DISTRICT COURT JUDGE PRESIDING

APPENDIX C — CHILD CUSTODY ORDER OF THE NORTH CAROLINA, CUMBERLAND COUNTY GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION FILED JANUARY 13, 2006

NORTH CAROLINA

CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE,
DISTRICT COURT DIVISION
FILE NO.: **00 CVD 2694**

RODNEY ROW

Plaintiff

vs.

LEIGH ROW (DEESE)

Defendant

CHILD-CUSTODY ORDER

THIS CAUSE was heard by the Honorable William C. Lawton, District Court Judge Presiding over the 15 and 16 August 2005 and 8 November 2005 Special Domestic Sessions of the District Court of Cumberland County, Fayetteville, North Carolina upon the plaintiff's motion for modification of custody and defendant's motion for modification of visitation.

Appendix C

Plaintiff was present in court and represented by George B. Mast of Smithfield, North Carolina. Defendant was present in court and represented by Marcia H. Armstrong of Smithfield, North Carolina.

After hearing the testimony of witnesses, reviewing exhibits, reviewing the court file and considering arguments of counsel and the relevant law, the Court makes the following:

FINDINGS OF FACT

1. The plaintiff is a citizen and resident of Hawaii.

2. The Defendant is a citizen and resident of Cumberland County, North Carolina and has been a resident of the State of North Carolina for more than six months immediately preceding this institution of this action.

3. All parties have received proper notice and are properly before the Court.

4. Plaintiff and defendant were married on 10 April 1991 and thereafter divorced.

5. Two children were born of the marriage: KAYTLYN MARIE ROW ("Kaytlyn"), born 24 April 1991 and GABRIELLE ALEXIS ROW ("Gabby"), born 13 March 1995.

Appendix C

6. An Order was entered in this cause on 28 February 2002 by the Honorable L. W. Payne. An Order to Modify Child Support was entered 20 December 2004 by the Honorable William A. Christian.

7. Plaintiff filed a Motion for Modification of Custody and Support on 22 March 2005. Thereafter, defendant filed a motion to modify visitation.

8. After two full days of testimony, there was very little evidence offered about the parties' youngest child, Gabby. There was some evidence of school performance changes as well as plaintiff's yet unfulfilled concerns that Gabby could possibly exhibit some of the same changes in attitude about visitation with plaintiff as the oldest daughter, Kaytlyn. No evidence was offered that such a change has materialized.

9. None of the evidence offered as to Gabby comes close to the modification of custody standard of a substantial change of circumstance affecting the welfare of the child. It is not in the best interest of Gabby and Kaytlyn to be separated by a split custody order.

10. This case therefore rises and falls on whether or not plaintiff has carried his burden of proof as it relates to the oldest child, Kaytlyn.

11. Central to this action is Kaytlyn's problematic relationship with plaintiff and its root causes. It is clear that although Kaytlyn loves her father, she no longer desires to have extended visits with him.

12. Kaytlyn's age and the onrush of the teen years, with all the physiological and psychological changes that those years normally bring, exacerbate the serious relationship issues that have developed between Kaytlyn and the plaintiff.

13. Despite a court-ordered psychological evaluation and the testimony of the Kaytlyn's therapist, as well as the court's own meeting at length with Kaytlyn, in the presence of counsel, this Court cannot determine the root causes of Kaytlyn's stress. The outward symptoms of her stress are both severe and extremely worrisome to this court: increasingly serious self-mutilation (by cutting, scraping and burning) and frequent suicidal thought.

14. The court is convinced from the evidence that neither defendant nor her husband is alienating either daughter's feelings for the plaintiff.

15. For reasons that were not clear to the court from the evidence presented, the court is equally convinced of plaintiff's open contempt for both defendant and her husband. His testimony at

trial made that crystal clear. The evidence also shows that plaintiff does an ineffective job of hiding that contempt from the children. Kaytlyn is so attuned to plaintiff's contempt for her mother and step-father that she does not desire to be around plaintiff or discuss this with him and is afraid to develop a closer relationship with her step-dad for fear of incurring the wrath of plaintiff.

16. Plaintiff's open contempt of defendant and her husband has not alienated the children from defendant but rather has caused at least Kaytlyn to be alienated from plaintiff and strongly desirous of keeping her distance from plaintiff and her exposure to him at a minimum. In this court's opinion, this is a disastrous consequence to plaintiff and to Kaytlyn's psyche.

17. Because of the need for continuing treatment for Kaytlyn's deep-seeded psychological issues, this court is of the opinion that this matter needs review of the impact of this decision on the children in approximately one year, via a thorough examination of treating professionals through deposition or court hearing in the court's discretion.

18. The home of plaintiff and the home of the defendant are fully adequate to meet the physical needs of both children.

19. In terms of parental "fitness", as that term is defined and explained by the case law of this State, both parties are fit to exercise parental control over the children.

20. Plaintiff resides in Hawaii and his workplaces are within 12 miles of his residence. The school in which he would enroll the children is a quality private school so situated that he can provide transportation to and from school.

21. Both children are currently in the same private school in Fayetteville, NC in which they were enrolled four years ago when the previous order was entered.

22. Both plaintiff's and defendant's extended families reside in the eastern half of the United States.

23. At time of the previous Order, the children were 10 and 6 years of age and plaintiff had frequent, relatively lengthy phone contact with each. Over the intervening years, Kaytlyn does not want to talk much with plaintiff by phone.

24. Both parties seem to agree that the children are not doing as well recently in school as the parents believe they are capable of doing.

25. The children seemed to be functioning well under the previous court order until plaintiff

began to notice a difference in his relationship with Kaytlyn at the beginning of the summer 2003 visitation. Plaintiff and Gabby have no problems with their relationship at this time.

26. There have been some visitation "timeliness" and placement (where visitation is to occur) issues between the parties since the previous Order. The parties would rather assume the motive and positions of each other rather than actually have polite and civil discussions which could have solved the problems in most cases and removed rancor and bitterness in all cases.

27. The plaintiff has been less than supportive of both Kaytlyn's choice of "church youth group" affiliation and her strong faith in God. Admittedly at age 14, one is not as "mature" in depth of thought process as later in life; but Kaytlyn's faith is a definite plus in her life. It is obvious to the court that plaintiff has questioned her faith and beliefs and thus made Kaytlyn very reluctant to talk to her father about this as well as about life and growth issues for a young person in general.

28. It seemed to the court that Kaytlyn's church choice was put "on trial" in this proceeding by the plaintiff as much as custody, notwithstanding the fact that plaintiff and defendant jointly decided to place both children in the school affiliated with this very church. After hearing

from two different youth pastors as well as the pastor of the church with which the girls' school is affiliated, the court is satisfied that this church is not "cultish" but rather provides a sound evangelistic faith foundation for the young people in its school.

29. Kaytlyn requested plaintiff to allow her to cut short her summer visitation during 2005 by a week or so for her to go on a mission trip, which plaintiff refused to allow for a number of reasons satisfactory to him but without making an effort to inquire about the supervision and security issues that he had valid concerns about.

30. There are a number of things that have accumulated as Kaytlyn has aged which, when added to the normal stress and physiology of these years on teenage girls, have created an obvious rift in Kaytlyn's relationship with the plaintiff.

31. Kaytlyn has much less contact and communication by phone now with plaintiff. When describing his phone calls with her, plaintiff describes typical teenage one-word answers to long or inquisitive questions about life and school. Plaintiff's phone contact and quality of his conversation with Gabby are unchanged.

32. Even though Kaytlyn's visits with plaintiff have been increasingly more problematic, they still provide valuable and quality times for plaintiff to be with and interact with Kaytlyn who does seem, and the court believes, is troubled by her fractious relationship with her father. The plaintiff lives so very far away from the children that it is critical for him to have time with both girls, especially Kaytlyn, to heal the frayed relationship with her.

33. It will be necessary, for Kaytlyn's mental health and proper adjustment, for Kaytlyn to obtain and continue counseling for the discovery of the source of, and the rebuilding of, the fractious relationship between her and her father. Both parties need to have free and unfettered access to any such counselor; and the treatment counselor shall, in his or her unfettering discretion, share information with the parties that will or could lead to the improvement of Kaytlyn's mental health and relationships.

34. There appear to be no current problems in the relationship between plaintiff and Gabby.

35. While there seems to be some falling of academic performance of primarily Kaytlyn, the testimony of Dr. Lancaster makes it pretty clear and the court finds as a fact that the stress in Kaytlyn's life from the custodial issues and the conflicts in her relationship with her father are

most likely the causes in the fall of her academic performance. The court finds no neglect of defendant or her husband in this regard.

36. Kaytlyn is especially resistant to the extended summer visits with plaintiff. She is somewhat fearful of plaintiff. She is intimidated by him, stating he will not listen to her, belittles her faith and speaks negatively of defendant and her husband. Although Kaytlyn has been unable to specifically articulate her fears and feelings, she has taken to multiple self scratching and burnings with a cigarette prior to visits or time-related to the stress of confrontation with plaintiff. Kaytlyn has discussed suicide with others.

37. It is the feeling of this court that, despite counseling with a professional, conversations with coaches/youth pastors, talking with defendant and talking with the court, Kaytlyn remains very guarded and is not forthcoming about the reasons for her feelings of fear, intimidation and dislike for plaintiff. She remained so with Dr. Lancaster who performed a mental health evaluation of Kaytlyn upon the court's request.

38. It is critical that the relationship between Kaytlyn and plaintiff be reestablished into a healthy one of mutual love and respect in order for Kaytlyn to adjust appropriately as a

teenager. It is especially important to the resumption and enforcement of longer-term custodial time with plaintiff, enforcement being a moot issue if the relationship becomes a healthy one.

39. Plaintiff testified that if he were the primary custodial parent of both children he has made arrangements for both girls to attend a private parochial school; and he is, apparently, willing to pay for said schooling for the girls.

40. The homes and physical facilities of both parties are quite suitable places for the children to reside. This court has no doubt that each party cares for and wants what is best for each of the children. It is equally clear to the court from plaintiff's demeanor and his attitude (displayed in his manner of testifying) toward defendant as well as from his words used in describing both defendant and her husband (as exemplified in at least one e-mail testified to at trial) that plaintiff is so embittered toward defendant that he is not capable of speaking civilly to or interacting rationally with defendant face-to-face. Plaintiff's deep negative feelings toward defendant spill over into his interactions with the girls for it seems at least Kaytlyn really knows how plaintiff feels about defendant.

41. Both the school the girls are in now, as well as the school where plaintiff would enroll the girls

are church affiliated schools yet plaintiff has questions about the church youth group Kaytlyn attends very regularly as well as the "beliefs" of the church to which the girls' school is affiliated, although this is the school plaintiff and the defendant put the girls in by mutual choice when both lived in NC. In fact, during the trial, plaintiff testified, with little elaboration, "I think Pentacostal church doctrine is dangerous to the children." This comment and plaintiff's apparent firm feelings toward Kaytlyn's faith, which is very important to her, is but one evidence of the emotional chasm between plaintiff and Kaytlyn. Add this to the fact that Kaytlyn is now a teenager with all those "teenager issues" and the fact that Kaytlyn has close friends in North Carolina, it is not a surprise to the court that there is a rift between plaintiff and Kaytlyn (that needs to be healed) which is exacerbated by the extended summer visitation.

42. Despite plaintiff's reservations about Kaytlyn's church affiliation, he acknowledges that she does not exhibit the socially unhealthy habits displayed and acted upon by many teens.

43. Plaintiff's extremely negative feelings toward defendant and her husband are very profound and are evidenced by his testimony. He considers both her and her husband dishonest, unethical, creating an "unhealthy environment

for the children," manipulative of the children and the court, and encouraging of outright deceit in the children. While the court has made one finding in a separate order that defendant was "in contempt" of an unambiguous provision of the previous court order, the court also notes that the defendant expressed a rational justification for her conduct, which the court found was not a legal justification. As to plaintiff's other characterizations of defendant and her husband, the court can find no substantial basis beyond plaintiff's "feelings", which this court has no doubt are real. Kaytlyn's in camera (with counsel present) discussion with the court does not support plaintiffs feelings nor did the testimony of the therapist or the mental health evaluation. While plaintiff's feelings toward defendant and her husband are real, as they may relate to custody of, and care for, the children, the feelings have no supporting basis in fact.

44. Plaintiff took Kaytlyn to see a child/adolescent psychiatrist after the reports of Kaytlyn's self-mutilation prior to a visit. Dr. Batzer saw Kaytlyn four times in the summer of 2005. Though not diagnosing depression, Dr. Batzer noted a "parent-child problem" between Kaytlyn and plaintiff, a problem that could get better or get worse. Dr. Batzer senses that the then-friction between plaintiff and Kaytlyn was severe enough that she was looking elsewhere

to have a "father figure" in her life. Dr. Batzer noted the strained relationship to be a significant emotional issue with Kaytlyn that she tries to minimize. Dr. Batzer freely admitted that he had not gotten any input from defendant or from Kaytlyn's current counselor.

45. Kaytlyn did reveal to Dr. Batzer that she was happy living with defendant and her husband in NC and that she reported no other significant "relationship problems." Dr. Batzer did reflect, as the other professionals in Kaytlyn's life have, that it was difficult to get her to "open up" about her relationship issues with plaintiff and that she displayed more emotions about it than she was willing to admit.

46. Dr. Batzer did express a feeling that remains troubling to this court as well. He described what could happen to Kaytlyn's emotional make-up if she were moved from her family in NC where she is happy to live with plaintiff, with whom she has a parent-child relationship problem, in Hawaii as "a lot of it is just an unknown."

47. Dr. Batzer did indicate he was willing to work with plaintiff and Kaytlyn in trying to repair their damaged relationship.

48. From the testimony of both parties, it is clear to the court that confrontations and

disagreements between the parties arise so easily that neither is willing to voluntarily share any of their home or family activities (with the children) with the other party lest they be a criticism or recrimination. This is why defendant did not share with plaintiff such things as a family cruise and why plaintiff did not share with defendant that he took the girls to see a counselor/therapist in the summer of 2005. They cannot civilly communicate; and it is not the obligation of these children in the middle to be news sources because they know their parent's feelings toward each other and are afraid to openly talk.

49. The sense of the court is that every professional that testified, live or by deposition, believes that when the two parties overcome the bitterness and become at least civil "friends" for the benefit of their children, the two children will adjust more normally and be more open with both.

50. Kaytlyn exhibits an unusually strong attachment to her church youth group and seems to be developing a solid faith foundation in her life. This is obviously very important to her. While the court cannot require either party to join in Kaytlyn's church youth group choices, it would be important for Kaytlyn if they shared in this very important part of Kaytlyn's life. Neither party regularly attends church to the same degree as Kaytlyn. At the very least,

neither party should belittle or disparage Kaytlyn in her "faith journey". An example of how important church involvement is to Kaytlyn is defendant's testimony that Kaytlyn "comes alive" in her church youth group.

51. Neither party, none of the counselors/therapist/evaluations nor the court could get Kaytlyn to open up with many specifics about why she fears plaintiff and does not want to go for extended visits. This is a great concern for the Court, especially since the stress of the "relationship" causes Kaytlyn to engage in self-harming behavior.

52. Both parties are unhappy with the oldest child's school performance (though her most recent report card shows improving grades). The court finds that based on the professional evaluations and testimony, Kaytlyn's academic performance is directly linked to the parent-child relationship stressors with the plaintiff, and it is likely that her grades will improve when the stressors are removed.

53. Defendant has been very involved in the children's school work and is available to attend all the girls' important daytime and after school activities. Plaintiff testified that he would do likewise were he the custodial parent.

54. The children react to and interact well with defendant's husband. They do however maintain some emotional "distance" from defendant's husband because both girls are well aware of plaintiffs dislike for defendant, and especially for defendant's husband.

55. It is sad for these girls and for this fractured family that the plaintiff was stationed half a world away from the children. From the testimony, the custodial exchanges and times were much easier and smoother when plaintiff and defendant lived in the same area. The current distance and emotional separations between the parties will be similar regardless of where the children live. It is significant that the children have always called the Fayetteville area home, that Kaytlyn is very resistant to extended visits with plaintiff (much less permanent residence with him), that there seem to be few "substantially" changed situations in the girls lives which affect their general welfare, and that the serious "relationship problems" between plaintiff and Kaytlyn have manifested themselves by Kaytlyn engaging in very disturbing self-harming behavior and even general discussions about suicide.

56. As Kaytlyn became increasingly more resistant to extended summer visits with plaintiff, defendant took her to a counselor to see how to "fix" the problem. Kaytlyn feels that all summer

visitation is "unfair' and that she cannot talk about it with plaintiff, and that plaintiff "uses curse words" when he talks about defendant. Kaytlyn's therapist Cynthia Harris expressed concerns that Kaytlyn shows almost no emotion when discussing these matters. Before the next summer's visit Kaytlyn's symptoms had escalated to what this court deems serious self-harming behavior. Ms. Harris, as of the date of trial, is still concerned by the fact that Kaytlyn is so unwilling to share her feelings. From Dr. Lancaster's report, it seems Kaytlyn was equally unwilling to share specifics about feelings toward plaintiff, resorting to statements like she simply was "ignoring the problems" with her Dad and "I've always not liked it (the relationship with her father), now its worse." So very much is being masked by this troubled fourteen year-old.

57. The "Mental Status Exam" portion of Dr. Lancaster's psychological evaluation of Kaytlyn's corroborates the court's feelings about this young girl. It remains a fearful thing for this court to read and contemplate. But it serves only to reinforce concerns the court already had about Kaytlyn, a concern that should deeply affect and motivate each party. This report reflects the actual mental and very guarded emotional state of this young girl. It is telling however, from the report of Dr. Lancaster, to read how each party perceives

Kaytlyn. The plaintiff seems to feel that Kaytlyn is more deliberate, willful, manipulate and calculating in her behaviors than does the defendant. While this court will not choose sides in these differing viewpoints, suffice it to say that whatever is going on in Kaytlyn's head, the behaviors and thoughts about suicide are absolutely concerning and the reasons behind them must be determined, for her safety and long-term mental health and social development. This court will not act in a way to increase, rather than decrease, the stressors in Kaytlyn's life.

58. This court strongly agrees with Dr. Lancaster that the things going on in Kaytlyn's life that affect her psyche are having an impact that is "much more concerning" than those exhibited by the "average teen." Her minimizing of the importance of her stressors "could be significant" and it is necessary that therapy and treatment get these feelings out onto the surface — now. By not understanding the sources of her emotions, the potential is there for Kaytlyn to make significantly wrong decisions in her young life. Kaytlyn has emotional areas in her life where she is "really struggling" and is, yet, unable to verbalize, talk about and work them out. Efforts must be made to address safety issues relating to Kaytlyn's self-harming behavior.

59. This court is of the opinion that the previous order herein is working fine, as is, for Gabby. As for Kaytlyn, the evidence has failed to rise to a "substantial change of circumstance affecting the welfare of the child" to warrant a change of her custodial status.

60. However, the current emotional and mental state of Kaytlyn and the increasingly deteriorating relationship between Kaytlyn and the plaintiff do warrant a modification of the previous order to address the mental health needs of Kaytlyn and reduce the stress in her life.

61. It is in the best interest of the children that during every visit with the plaintiff, the plaintiff shall facilitate the location of a place of worship to foster the children's blossoming faith, especially Kaytlyn's, and provide for their transportation to and from such place of worship. In this endeavor, it might be helpful to plaintiff to seek suggestions and help in locating such a place from Kaytlyn's current Wednesday night Youth Fellowship Minister.

62. It is apparent that, due to Kaytlyn's lack of ability to openly share her feelings and the past acts of self-injury that have admittedly occurred (and were more frequent than even either party was aware), Kaytlyn is in need of psychiatric intervention in conjunction with her current

psychological counseling and treatment. Somehow, some way, it is important to Kaytlyn's emotional, physical and mental well-being that someone uncover the core of Kaytlyn's troubling conduct.

63. Kaytlyn is unable to explain why she harmed herself except to say "someone at school had done it and it makes her feel better." Even now, in sharing with the evaluator, Kaytlyn was unable to clearly explain why she felt, how she felt and did what she did. For this reason, Kaytlyn is in need of counseling/therapy to resolve these issues; and the parties shall obtain this therapy in conformity with paragraph #6 of Dr. Lancaster's report and share equally the cost of this therapy that is not covered by insurance.

64. Because of the vast physical distance between the parties, this court is reluctant to change any of the non-summer visitations, even though Thanksgiving does interfere with the children's school year. Flight schedules have been a divisive issue between the parties, unnecessarily causing hours of litigation between the parties over charges of contempt.

65. While the evidence herein has failed to rise to such a level as to meet the burden of proof to show a "substantial change of circumstances affecting the welfare of Kaytlyn that warrants

a change of custody there is a need to address the psychological issues facing Kaytlyn. Also in this regard, and because of the pressing psychological needs of Kaytlyn, summer visitation does need to be shortened to allow a more gradual separation from church and friends as well as a gradual preparation of Kaytlyn, as well as both parties' households for the extended summer visitation with plaintiff.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. There has not been a substantial and material change in circumstances since the entry of 28 February 2002 Order by the Honorable L. W. Payne that adversely affects Gabby and warrants a modification of the Order.

3. There has not been a substantial and material change in circumstances since the entry of the 28 February 2002 by the Honorable L. W. Payne that adversely affects Kaytlyn that warrants a modification of custody. However, there has been a substantial and material change in circumstances adversely affecting Kaytlyn that warrants modification of summer visitation as set forth herein.

4. Except as modified herein the 28 February 2002 Order by the Honorable L. W. Payne shall remain in full force and effect.

IT IS THEREFORE, **ORDERED, ADJUDGED AND DECREED** as follows:

1. Defendant shall continue to have primary custody of the children as set forth in the 28 February 2002 Order entered by the Honorable L.W. Payne.

2. With regard to all but the summer visitation as that visitation affects Kaytlyn, the previous Order remains in full force and effect, subject to the following clarifications regarding the plaintiff's Thanksgiving and summer visits:

    a. Plaintiff shall be allowed visitation with the children on Thanksgiving week from the weekend before Thanksgiving to be returned on a flight to originate in Hawaii the Saturday after Thanksgiving. The children shall be sent on a flight to Hawaii on either the Saturday or the Sunday before Thanksgiving whichever is chosen by defendant for reasons of less cost or fewer connections.

    b. Since the children will miss two or three days of school during Thanksgiving visitation, it is the responsibility *of* defendant to make arrangements with

teachers for the taking, early or later, of any tests that will be missed by either child.

c. Kaytlyn shall visit with the plaintiff from June 20 of each year, to conclude with her return with Gabby at the end of the summer visit as set forth in the prior order. Should a flight not be available on June 20, Kaytlyn shall be on the first available flight after that date, the flight to be booked at least 30 days in advance of June 20. Defendant should schedule any camps or mission trips or youth trips for Kaytlyn prior to the 20 June date.

d. For all visitations, the children shall be booked on the first available flight (preferably a direct flight) after the end of school that is available between the hours of 9:00 a.m. and 6:00 p.m. from Raleigh-Durham International Airport. The returning flight booked shall have the children return from Hawaii and arrive at RDU between the hours of 8:00 a.m. and 7:00 p.m. at least twenty-four hours before the beginning of the first school day at the end of the visitation.

3. Both parties are ordered to refrain from saying or displaying negative feelings toward the other or toward any subsequent spouse or "significant other". This proscription applies to every comment

or act in the presence of, or within the hearing or sight of, either child.

4. During every visitation with the children, plaintiff shall facilitate the location of a place of worship to foster the children's blossoming faith, especially Kaytlyn's, and provide for their transportation to and from such place of worship. In this endeavor, it might be helpful to plaintiff to seek suggestions and help in locating such a place from Kaytlyn's current Wednesday night Youth Fellowship Minister.

5. Defendant shall locate a licensed psychiatric counselor to work with her current counselor. Additionally, those counselors shall locate a professional in Hawaii for Kaytlyn to meet with if necessary and that person could be either of the doctors Kaytlyn has already met with as long as her treatment team in North Carolina has no valid objections to those professionals.

6. The parties shall obtain this therapy in conformity with paragraph #6 of Dr. Lancaster's report and share equally the cost of this therapy that is not covered by insurance.

7. Each party shall, within 48 hours, inform the other when either child visits any medical or mental health treatment provider and each party shall have equal and unfettered access to the records of that

professional, as long as there are no legally recognized privileges of the children that might be violated.

8. Both parties shall have equal access to all medical, dental and therapeutic records of the children; provided that any therapist shall have the final say in what he or she shares with the parties from any child's mental health records. Each party shall pay one-half of all costs of therapy/mental health counseling of either minor child not covered by insurance.

9. If Kaytlyn receives a D or an F in any course, or by mid-semester is, in the opinion of her teacher, at risk of receiving a D or an F, defendant shall at her own expense provide tutoring for Kaytlyn in all course work where she is failing or at risk of a grade of D or below.

10. Should the primary custodial parent decide, for any reason other than paragraph 9 above, academic tutoring is necessary for the girls, any cost for such tutoring shall be shared equally by the parties. The custodial parent shall provide a detailed explanation (including teacher recommendations) for the need for such tutoring to the non-custodial parent.

11. Neither party shall disparage the other, or allow disparagement of the other, in the presence of or within the hearing of the minor children.

12. Plaintiff shall, prior to the children's next summer visit, complete a parenting class on the subject of how to constructively converse with teenage children. Some suitable counseling and instruction by Dr. Batzer in Hawaii should suffice for this requirement. Also during the summer visitation, plaintiff and Kaytlyn shall attend joint counseling sessions geared to mending their relationship. The cost of such counseling shall be borne by plaintiff.

13. Except as specifically set forth herein, there shall be no alteration of the visitation schedule of the prior Order unless it is jointly agreed upon. Any agreements resulting in a reduction to Thanksgiving or Christmas or Easter/Spring break times of plaintiff with the children shall be replaced by adding those days to the front end of their summer visit with plaintiff. Defendant shall not purchase the tickets for spring break more than 45 days in advance of the school break.

14. Plaintiff shall schedule at least one joint counseling session for him and Kaytlyn at the beginning of each of the spring break and summer visits with Kaytlyn. Any such treatment counselor in his or her discretion shall be allowed to communicate with Kaytlyn's therapist in North Carolina. This requirement need not be followed only if Kaytlyn, with the advance concurrence of her therapist in NC, expresses her desire that such counseling not take place.

Appendix C

15. Except as modified herein, Judge Payne's Order of 28 November 2002 shall remain in full force and effect.

16. To the extent that it is feasible and possible, plaintiff shall schedule his time off on available vacation time to coincide with the times both children will be with him over spring break from their school and summer vacation from school.

17. This cause is retained for further orders.

This the 6th day of January 2006.

s/ William C. Lawton
THE HONORABLE WILLIAM C. LAWTON
DISTRICT COURT JUDGE PRESIDING

APPENDIX D — CONTEMPT ORDER OF THE NORTH CAROLINA, CUMBERLAND COUNTY GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION FILED JANUARY 12, 2006

NORTH CAROLINA

CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 00 CVD 2694

RODNEY ROW,

Plaintiff

vs.

LEIGH ROW (DEESE),

Defendant

CONTEMPT ORDER

THIS CAUSE coming on to be heard and being heard before the Honorable undersigned District Court Judge, William C. Lawton, presiding over a special session of the District Court in Cumberland County, North Carolina, on August 15 and 16, 2005 and on November 8, 2005, upon Plaintiff's motions for, inter alia, contempt of Defendant in failing to comply with the order of Judge Payne regarding "visitation." The Court, having heard evidence concerning the civil contempt of

the Defendant, preceding the determination of the other issues before the Court, makes the following Findings of Fact, Conclusions of Law and entry of its Order:

FINDINGS OF FACT

1. The Defendant, Leigh Row Deese, resides with her husband at 507 Shawcroft Road, Fayetteville, North Carolina, 28311, with the minor children, and was living at this address in November of 2003.

2. This is a hearing pursuant to Plaintiff's Motion in the Cause for Contempt in this matter filed on March 28, 2005, pursuant to N.C.G.S. Chapter 5A, for the enforcement of a prior Order of the Court, and for the Defendant to show cause why she should not be held in contempt for failing to abide by the orders of this Court. The Court finds that an Order was entered on November 13, 2001, which provided that the Plaintiff was to have secondary physical custody, to include the following visitation: "Thanksgiving of 2003 and every odd year thereafter from the Saturday before Thanksgiving at 6:00 p.m. until the day before school resumes at 5:00 p.m." (Paragraph 1.a.iv.) Said Order further provided that "the Defendant shall be responsible for the transportation costs for the Easter and Thanksgiving visitation." (Paragraph 2.b.) The Court Order is unequivocal and unambiguous in this regard.

3. While there is a separate provision for additional visitation "in North Carolina" for Plaintiff (Paragraph 1.a.vii.), which provides that this visitation is "not to

interfere with the minor children's school schedules," this latter clause modifies only Paragraph 1.a.vii. of the previous Order, and it does not apply to Paragraph 1.a.iv. concerning Thanksgiving visitation.

4. The Defendant did not make flight arrangements as required by the Order for the Thanksgiving 2003 visitation as ordered by Judge Payne. While there may have been some reservation of one or the other of the children, the Defendant's evidence is lacking that the Plaintiff undertook to obtain the necessary plane reservations for the children for the Thanksgiving 2003 visitation as required by the Order. There is no evidence that either child refused to go, Defendant, rather, contending that she believed that visitation was not to interfere with the ". . . children's school schedules."

5. The Defendant's evidence is deficient in its failure to show any just or legal cause for her failure to comply with the above provision of the Court Order on this one occasion. She chose to interpret the Order as she saw fit. Her choice was willful, intentional and deliberate, though she articulated what she thought was a valid reason, her reason belied by the clear and unequivocal language of the Court Order.

6. The Defendant had the ability to comply with the Order in November of 2003, or the ability to take reasonable measures that would have enabled her to comply with the Order.

7. The Plaintiff has in good faith expended substantial funds in prosecuting his contempt motion for what he viewed as numerous violations of the Court order, the provision herein ruled upon being the only violation that the Court bases its ruling on, the remaining allegations being found not contemptuous for one reason or another as expressed in open Court at the conclusion of the August, 2005 hearing.

8. George B. Mast has rendered valuable legal services in the representation of the Plaintiff in this hearing for contempt; that he has submitted an affidavit to the Court, indicating that he prepared the necessary motion, appeared in this Court relating to the motion for contempt, and has expended 9.75 hours in his representation of the Plaintiff relating to the motion for contempt; that Plaintiff's counsel is experienced in family law matters with some 45 years of experience; that the normal and reasonable value of legal services in this area for an attorney of the experience and expertise of the attorney representing the Plaintiff is $255.00 per hour; that the services rendered to the Plaintiff by his attorney have a reasonable value of no less than $2,486.25; that the Defendant has sufficient income and assets or the ability to take reasonable measures to secure such assets, and should be required to pay a portion of the fee of the Plaintiff's attorney in prosecuting the contempt motion.

9. This is the only remedy that the Court finds can even attempt to quantitatively and without sheer speculation place some value on the missed visitation which, of course, can never be replaced.

Based upon the foregoing Findings of Fact, the Court concludes as a matter of law as follows:

CONCLUSIONS OF LAW

1. That the Defendant has not made a good faith effort to comply with the Order of this Court as set forth herein, but rather has failed to comply with said Order, and such failure has been willful, deliberate, and without just and good cause, rendering the Defendant liable for punishment for contempt by this Court for willful violation of the November 13, 2001 Order of this Court.

2. That George B. Mast as counsel for the Plaintiff herein, is entitled to a reasonable attorney's fee for representation of the Plaintiff, and the sum of $2,486.25 is reasonable for such representation.

3. That the Defendant is liable for civil contempt and has the ability to pay at least a portion of the attorney's fee expended by Plaintiff in seeking enforcement of the Order entered herein.

IT IS NOW, therefore, ORDERED, ADJUDGED, and DECREED as follows:

1. The Defendant shall pay to the Plaintiff, as punishment for civil contempt; a portion of the attorney's fees expended by the Plaintiff for the enforcement of the order herein in the amount of $1,093.75.

2. The defendant shall pay this sum within 30 days of the date of this Order.

THIS the 5th day of January, 2006.

s/ William C. Lawton
THE HONORABLE WILLIAM C. LAWTON
DISTRICT COURT JUDGE PRESIDING

APPENDIX E — ORDER TO MODIFY CHILD SUPPORT OF THE NORTH CAROLINA, CUMBERLAND COUNTY, GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION DATED DECEMBER 6, 2004 AND FILED DECEMBER 20, 2004

NORTH CAROLINA
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NUMBER: 00 CVD 2694

RODNEY ROW,

Plaintiff

vs.

LEIGH ROW (DEESE),

Defendant

ORDER TO MODIFY CHILD SUPPORT

THIS CAUSE, coming on to be heard and being heard before the Honorable William A. Christian, District Court Judge, presiding over the February 16, 2004 Special Civil Session, Domestic Relations Division of said Court; and it appearing that this is before the Court upon remand of the issue of child support from the North Carolina Court of Appeals, and the Court, after hearing the evidence and arguments of counsel, makes the following:

Appendix E

FINDINGS OF FACT

I

That Plaintiff was present in Court and was represented by Attorney George B. Mast, and Defendant was present in Court and was represented by Attorney Timothy D. Edwards.

II

That Plaintiff and Defendant were lawfully married on the 10th day of April, 1991 and of this marriage two (2) children were born, to wit: KAYTLYN MARIE ROW, born April 24, 1991 and GABRIELLE ALEXIS ROW, born March 13, 1995; that the Plaintiff and the Defendant were subsequently divorced by this Court.

III

That Plaintiff is an able-bodied person, capable of employment, and is employed with the United States Army; that the Court finds that the Plaintiff's gross monthly income on his LES is $7,383.00 per month; that the Court deviated from the Plaintiff's LES deducting the COLA of $374.67, Housing allowance of $728.00 and an additional $150.00. Therefore, for child support purposes, the Plaintiff's gross income is $6,130.33 per month.

Appendix E

IV

That Defendant is an able-bodied person, capable of employment, and is employed with a gross income of approximately $4,161.32 per month; that the Court determined the Defendant's income from the Defendant's W2 as submitted to include income paid by the church school.

V

The findings of facts are based on the facts of the case as of November 2001, the time of the previous hearing. The combined income of the parties is $10,291.65 per month; that the Plaintiff's percentage share of the income is 60% and the Defendant's is 40%; that the parties' basic child support obligation is $1,631.00 per month.

VI

That the Court finds that the Defendant has work related child care costs for the minor children of $180.00 per month for 10 months each year, which results in an amount of $150.00 per month when pro-rated over a twelve-month period. The net amount of childcare costs, after adjustments in accordance with the North Carolina Child Support Guidelines, is $112.50 per month. The Defendant has extraordinary expenses for the minor children in the amount of $560.00 per month for 10 months each year for private school, which results in an amount of $466.67 per month when pro-rated over a

twelve-month period. The Defendant also has transportation costs for the minor children of approximately $200.00 per month for airfare for visitation purposes. The Defendant's total adjustments are therefore $779.17 per month.

VII

That the Court finds that the Plaintiff has dental insurance premiums of $19.08 per month; that in addition the Court finds that the Plaintiff has extraordinary expenses for the minor children in the amount of $266.67 per month for airfare for visitation purposes. The Plaintiff's total adjustments are therefore $285.75 per month.

VIII

The parties have made past expenditures for the health, education, and maintenance of the minor children in excess of $2,695.92 per month, and at the present time the needs of the children, which the Court finds as reasonable, are $2,695.92 per month for food, clothing, education and other basic necessities, based upon the attached Child Support Worksheet, which is incorporated herein by reference.

IX

That both the Plaintiff and the Defendant are primarily liable for child support, and at the present time, with the Defendant being the custodial parent, the

sum for the Plaintiff to pay for child support for health, education and maintenance, having due regard for the circumstances of the parties and the children as required by North Carolina Child Support Guidelines and N.C. Gen. Stat. § 50-13.3(b) and (c), is $1,331.80 per month; the Plaintiff has the means to pay said sum or the ability to take reasonable measures in order to pay the said amount.

X

Due to the modification of this Court of the child support amount, the Court's Order generates an arrearage in the amount of $2,829.47. Plaintiff has made payments of $1,650.00 per month, beginning March 1, 2004 and ending October 1, 2004, and a payment of $1,505.96 on November 1, 2004, at which time the arrearage of $2,829.47 was paid in full. Effective December 1, 2004, the monthly child support amount is $1,331.80.

XI

That the Court did not review Plaintiff's motion to rebut nor consider Plaintiff's constitutional challenge, in that this matter was remanded from the Court of Appeals, and this Court is only determining the matter of child support that was improperly determined in the previous hearing. Issues relating to rebuttal and constitutionality are not being considered by this Court at this time, in that they were not raised in the initial hearing. The Court uses the guidelines that were in effect

at the previous hearing in determining child support. Plaintiff's motion for modification of child support as of the date of this hearing will be considered by the Court at a later date.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

1. That this Court has jurisdiction over the subject matter and *in personam* jurisdiction over the Plaintiff and the Defendant.

2. That this Court has the authority and right under the provisions of N.C. Gen. Stat. §50A and N.C. Gen. Stat. §1-75, 1-75.4, 6 and Rule 7 of the North Carolina Rules of Civil Procedure to exercise jurisdiction in the determination of the support of the minor children and this Court should assume jurisdiction to make such a determination.

3. That the sum of $1,331.80 per month for the support and maintenance of the minor children meets the reasonable needs for their health, education and maintenance, having due regard to the circumstances of the parties and the children as required by N.C. Gen. Stat. §50-13.4(b) and (c).

4. That the Plaintiff and the Defendant are liable for the support of the minor children; that the Plaintiff has the ability at this time to provide the sum of $1,331.80 per month for the support of said minor children, having

due regard to the relative ability of the parties to provide support and to the circumstances of the parties and the children as required by N.C. Gen. Stat. §50-13.4(b) and (c).

5. That due to the modification of this Court of the child support amount, the Court's Order generates an arrearage in the amount of $2,829.47. Plaintiff has made payments of $1,650.00 per month, beginning March 1, 2004 and ending October 1, 2004, and a payment of $1,505.96 on November 1, 2004, at which time the arrearage of $2,829.47 was paid in full. Effective December 1, 2004, the monthly child support amount is $1,331.80.

6. That the Court of Appeals ruling prohibits the trial court from making any findings of fact or conclusions of law as to rebuttal and constitutional issues, and is limited to findings and conclusions as to Child Support Worksheet A. The Court does not consider the motion to rebut and the constitutionality of the North Carolina Child Support Guidelines in that the Plaintiff did not raise these issues at the initial hearing in November 2001.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the Plaintiff shall pay or cause to be paid, the sum of $1,331.80 as child support for the parties' minor children, the first payment shall be made on or before the 1st day of March, 2004, and a like sum shall

be paid on or before the 1st day of each consecutive month thereafter until the minor children finish high school or are emancipated, whichever is earlier, or until further orders of this Court.

2. That all child support payments shall be made through the North Carolina Child Support Centralized Collections, P.O. Box 900006, Raleigh, NC, 27675-0577. Payments may be made by check, money order, or other certified funds, made payable to "NC Child Support."

3. The Court's retroactive increase in the child support amount generates an arrearage in the amount of $2,829.47. The Plaintiff has made payments of $1,650.00 per month, beginning March 1, 2004 and ending October 1, 2004, and a payment of $1,505.96 on November 1, 2004, at which time the arrearage of $2,829.47 was paid in full. Effective December 1, 2004, the monthly child support amount is $1,331.80. This cause is retained for further orders.

THIS THE 6th day of December, 2004.

s/ William A. Christian
HON. WILLIAM A. CHRISTIAN

STATE OF NORTH CAROLINA

CUMBERLAND County

File No.	IV-D Case No.
00 CVD 2694	
Case No. (Code)	UIFSA Case No.

In The General Court Of Justice
☒ District ☐ Superior Court Division

☒ Civil Plaintiff RODNEY ROW
☐ Criminal: STATE
VERSUS
Name Of Defendant
LEIGH ROW (DEESE)

WORKSHEET A
CHILD SUPPORT OBLIGATION
PRIMARY CUSTODY

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth
KAYTLYN MARIE ROW	04/24/1991		
GABRIELLE ALEXIS ROW	03/13/1995		

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	$ 6,130.33	$ 4,161.32	
a. Minus pre-existing child support payment	-	-	
b. Minus responsibility for other children	-	-	
2. MONTHLY ADJUSTED GROSS INCOME	$ 6,130.33	$ 4,161.32	$ 10,291.65
3 PERCENTAGE SHARE OF INCOME (line 2 for each parent's income divided by Combined Income)	60 %	40 %	
4. BASIC CHILD SUPPORT OBLIGATION (apply line 2 to Combined Child Support Schedule, see AOC-A-162, Rev. 10/02)			$ 1,631.00
5. ADJUSTMENTS (expenses paid by each parent)			
a. Work-related child care costs (see instructions)	$	$ 112.50	
b. Health insurance premium costs-child(ren) portion only (total premium ÷ # of persons covered x # of children subject to order = children's portion)	$ 19.08	$	
c. Extraordinary expense (note duration at bottom if time for adjustment differs from duration of child support obligation)	$ 266.67	$ 666.67	
d. Total Adjustments (add two totals for combined	$ 285.75	$ 779.17	$ 1,064.92
6. TOTAL CHILD SUPPORT OBLIGATION (add lines 4 and 5d combined)			$ 2,695.92
7. EACH PARENT'S CHILD SUPPORT OBLIGATION (line 3 X line 6 for each parent)	$ 1,617.55	$ 1,078.36	
8. NON-CUSTODIAL PARENT ADJUSTMENT (enter non-custodial parent's line 5d)	$ 285.75	$	
9. RECOMMENDED CHILD SUPPORT ORDER (subtract line 8 from line 7 for the non-custodial parent only. Leave custodial parent column blank)	$ 1,331.80	$	

Date 12/6/04

Prepared By (Type Or Print) George R. Mast

(NOTE: This form may be used in both civil and criminal cases.)

AOC CV-627, Rev. 10/02
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Best Available Copy

Appendix E

APPENDIX F — PETITION FOR DISCRETIONARY REVIEW FILED MARCH 10, 2008

No. 468P07 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

(Row v Row)

RODNEY ROW

v

LEIGH ROW (DEESE)

From NC Court of Appeals
(06-1692)
From Cumberland
(00CVD2694)

ORDER

Upon consideration of the petition filed on the 25th day of September 2007 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Appendix F

"Denied by order of the Court in conference, this the 6th day of March 2008.

s/ Hudson, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of March 2008.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Shaula A. Brannan
Shaula A. Brannan
Assistant Clerk

APPENDIX G — CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. art. VI cl. 2

Clause 2. Supreme Law of Land. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix G

42 U.S.C. § 654

A State plan for child and spousal support must—

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan;

42 U.S.C. § 667

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

Appendix G

45 C.F.R. § 302.56
Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the noncustodial parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would

have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

N.C.G.S.A. § 50-13.4
Action for Support of Minor Child

(c1) Effective July 1, 1990, the Conference of Chief District Judges shall prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes and shall develop criteria for determining when, in a particular case, application of the guidelines would be unjust or inappropriate. Prior to May 1, 1990 these guidelines and criteria shall be reported to the General Assembly by the Administrative Office of the Courts by delivering copies to the President Pro Tempore of the Senate and the Speaker of the

House of Representatives. The purpose of the guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. The guidelines shall include a procedure for setting child support, if any, in a joint or shared custody arrangement which shall reflect the other statutory requirements herein.

Periodically, but at least once every four years, the Conference of Chief District Judges shall review the guidelines to determine whether their application results in appropriate child support award amounts. The Conference may modify the guidelines accordingly. The Conference shall give the Department of Health and Human Services, the Administrative Office of the Courts, and the general public an opportunity to provide the Conference with information relevant to the development and review of the guidelines. Any modifications of the guidelines or criteria shall be reported to the General Assembly by the Administrative Office of the Courts before they become effective by delivering copies to

the President Pro Tempore of the Senate and the Speaker of the House of Representatives. The guidelines, when adopted or modified, shall be provided to the Department of Health and Human Services and the Administrative Office of the Courts, which shall disseminate them to the public through local IV-D offices, clerks of court, and the media.

Until July 1, 1990, the advisory guidelines adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall operate as presumptive guidelines and the factors adopted by the Conference of Chief District Judges pursuant to this subsection as formerly written shall constitute criteria for varying from the amount of support determined by the guidelines.

Appendix G

N.C.G.S.A. § 114-2(8)(a). Duties

It shall be the duty of the Attorney General:

(8) Subject to the provisions of G.S. 62 20:

a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

b. Upon the institution of any proceeding before any State agency by application, petition or other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney General with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies.